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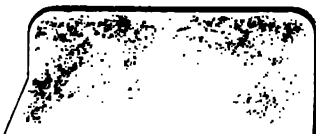
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REPORTS OF CASES

IN

CRIMINAL LAW,

ARGUED AND DETERMINED

IN ALL THE COURTS IN ENGLAND AND IRELAND.

EDITED BY

EDWARD W. COX, Esq., OF THE MIDDLE TEMPLE,

~~Barrister-at-Law.~~

VOL. III.

1848 to 1850.

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REPORTERS.

CRIMINAL APPEAL CASES, before all the Judges, by **A. BITTLESTON, Esq.**;

CENTRAL CRIMINAL COURT, by **B. C. ROBINSON, Esq.**;

NORTHERN CIRCUIT, by **T. CAMPBELL FOSTER, Esq.**;

OXFORD CIRCUIT, by **J. E. DAVIS, Esq.**;

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Barristers-at-Law.



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REPORTS
OF
Criminal Law Cases.

COMMISSION OF OYER AND TERMINER AND
GENERAL GAOL DELIVERY FOR THE
CITY OF DUBLIN.

MAY SESSION, 1848.

May 22nd, 23rd, 25th, 26th, and 27th.

(Before LEFROY, B., and MOORE, J.)

THE QUEEN v. JOHN MITCHEL. (a)

Crown and Government Securities Act—Copy of indictment—Distinct felonies—Demurrer—Postponement of trial—Challenge to the array—Jury list—Practice—Pleading—Jury—Absence of a witness—Evidence.

A prisoner indicted for felony is not entitled to a copy of the indictment found against him, or to a copy of the jury panel, or to copies of the panels returned at former sessions of the court.

The prisoner was indicted in one set of counts for feloniously compassing, &c., to deprive and depose our Lady the Queen from the style, honour, and royal name of the Imperial crown of the United Kingdom and, on certain days in the indictment named, feloniously expressing said compassings by feloniously publishing certain printings in a certain public newspaper, of which he was then and there the proprietor: and, in another set of counts, with feloniously compassing to levy war against the Queen, in order, by force and constraint, to compel Her Majesty to change her measures and counsels, and with feloniously expressing such last-mentioned compassings by feloniously publishing the same printings, and on the same days and in the same public newspaper as in the first set of counts mentioned.

Held, that the two felonies, though distinct, were properly joined in the indictment.

And semble, that the question in such cases is—not whether the felonies charged are distinct—but whether they are repugnant or so dissimilar in their nature and circumstances as, if joined, to be likely to embarrass the prisoner in his defence.

Quære, whether a prisoner indicted for a felony not capital is not entitled to demur and plead over at the same time.

(a) Reported by W. ST. LEGER BABINGTON, Esq. Barrister-at-Law.

Semble, that Reg. v. Purchase (Car. & Marsh. 619); and Reg. v. Phelps. (ib. 180), are in that respect overruled by Reg. v. Odgers (2 Mood. & Rob. 480), and can no longer be considered law; and that the judgment upon a demurrer in a criminal case, not capital, is final judgment, and not a respondeat ouster.

On the 13th May the prisoner was committed for trial at a session to commence on the 20th May, on which day a bill was sent up to the grand jury against him, which was on the 22nd found a true bill; and until the 23rd of May (when his trial was fixed for the 25th inst.), no attempt was made to secure the attendance of the trial of one S. M., who, it then appeared, had left Dublin on the 22nd. The court refused to postpone the trial, notwithstanding an affidavit, by the prisoner's attorney, that he believed sufficient grounds existed for challenging the array on the part of the prisoner, and that the said S. M. was "a most indispensable witness to sustain said challenge."

To induce a court to postpone a criminal trial on account of the absence of a witness, it must be shown, by affidavit, that the witness is material—that due diligence has been used to secure his attendance—and that it can be obtained by the postponement.

The array was challenged on the grounds, inter alia, that the panel was arrayed partially, and to the prejudice of the prisoner; and that, for the purpose of depriving him of a fair trial, the names of jurors usually summoned, and of other jurors, had been omitted from the panel, because they were deemed more likely to acquit than to convict; and the names of other jurors were inserted therein, because they were deemed more likely to convict than to acquit.

Held, that the mere fact of the existence of a great disproportion between the relative number of persons of different religious persuasions upon the panel was, per se, no evidence in support of such a challenge.

By the stat. 3 & 4 Will. 4, c. 91, it is the duty of the recorder, at a special sessions in each year, to revise, in open court, the general list of jurors returned, pursuant to the stat., and to deliver it when so revised and signed by him, to the clerk of the peace, who gives a copy thereof to the sheriff, as the jurors' book for the ensuing year, and from which the sheriff is bound to form the jury panel.

The court held that a list of the jurors' names, checked off by the witness as they were in open court placed on the revised list by the recorder, but which was not compared with the revised list after it was signed by the recorder, or with the jurors' book, was not admissible as evidence of the contents of the jurors' book:

And refused to direct the book itself to be produced for the purpose of ascertaining the different religions of the jurors named therein, and comparing their relative number with the proportion in which jurors of the same persuasion appeared on the panel.

Held, that a juror whose name, though he was summoned to attend the court, was left off the panel, could not be asked what his religion was.

The triers are entitled to know whether, in the opinion of the court, there is any evidence to sustain such challenge.

It is not necessary, in order to sustain an indictment for compassing to levy war against the Queen, in order by force and constraint to compel her to change her measures and counsels, either to aver in the indictment or prove at the trial, a compassing or intention to compel Her Majesty to change any particular measures or counsels.

Held, that upon an indictment, charging the publication by the prisoner of a printing purporting to be a report of a speech made by a Mr. Mitchel at Limerick, as an overt act of compassing to depose our Lady the Queen, and to levy war to compel her, by force and constraint, to change her measures and counsels, evidence that the prisoner spoke at the place mentioned a speech to the same purport, was only admissible to show that the prisoner was the Mr. Mitchel meant in the printed report of the speech in question.

A TRUE bill having been found against the prisoner by the grand jury of the city of Dublin, charging him, in several counts, with feloniously compassing, &c., to deprive and depose our Lady the Queen from the style, honour, and royal name of the Imperial crown of the United Kingdom, and with feloniously expressing, &c., the said felonious compassings, &c., by then and there feloniously publishing certain printings in a public newspaper called *The United Irishman*, of which he was the proprietor, and charging him also with a like compassing to levy war against the Queen, in order by force and constraint to compel her to change her measures and counsels, and with expressing, &c., the said felonious compassings, &c., by publishing certain printings in a public newspaper called *The United Irishman*, of which he was the proprietor. And the prisoner having been called on to plead, a motion was made that he be furnished with a copy of the indictment and of the jury panel, and of the jury panels returned at the three former sessions of the court, which application was grounded upon the following affidavit:—

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“The Queen } “Martin Francis O’Flaherty, of number eighty-
v. }
John Mitchel. } attorney for the defendant in this case, maketh oath and saith, that he, this deponent, on Wednesday last, the seventeenth day of May instant, personally, and through others, applied to Nathaniel A. Hamilton, Esquire, as also the undersheriff’s clerk for the city of Dublin, for a copy of the common jury panel summoned to serve at the approaching commission for said county of the city of Dublin aforesaid, and that he was refused the same; saith, that he has been advised, and believes, that a timely inspection and examination of said panel will be absolutely necessary for the proper defence of the said defendant, to enable him to exercise with due effect his legal right of challenge to such persons as may be objectionable upon said panel; saith, he, this deponent, has been informed and believes, a copy of the indictment, when duly found against the said defendant, will also be requisite for the proper conduct of his defence and that he has a legal right to same; saith, he has been advised, and believes, that copies of the three former jury panels, and which are now matters of record in the office of the Clerk of the Crown, will be indispensable to enable the said defendant to ascertain and test the proper construction of the present panel.”

Sir Colman O’Loghlen, in support of the motion.—It is stated in Hale and other text books, that at common law in England parties

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were not entitled to copies of the indictment. However that may be, it would seem that up to the time of Charles II. it was the *practice* in England to allow to prisoners copies of the indictment in felonies and treason. Thus, in *Bothe's case* (Sir F. Moore's Rep. 666), where the prisoner was indicted for forgery, which was felony under the Statute of Elizabeth, the prisoner was allowed a copy of the indictment, though the *Attorney-General* opposed the application. In the political trials in the reign of Charles II., cases which ought to be looked upon with great suspicion as authorities, as they were, as Sir Michael Foster remarks (p. 231), carried on "too often in the spirit of party"—copies of indictments were refused to prisoners, and in the 10th of Charles II. a resolution was passed by five of the judges assembled at the Old Bailey (Kelyng, p. 3), prohibiting copies of indictments for felony to be given, without special order to be made upon motion in open court. That resolution has given rise to the practice which has since prevailed in England: (*Anonymous*, 1 Lewin's Cr. C. 205, n.) This practice has been followed in Ireland, but whatever may be the common law of England, it would appear to be contrary to the common law of Ireland. This appears from the records of the Irish House of Commons (vol. 1, p. 174), and the practice, though uniform, cannot be considered as settled, as it has never been brought under the consideration of any court. It appears that in the year 1640, questions were prepared by the then Irish House of Commons, who sent them to the House of Lords with a request that they would lay them before the judges and request their opinion upon them. In proposing the questions the House of Commons prefaced them by a statement (amongst other things) that they did so, "not for any doubt or ambiguity which may be conceived or thought of for or concerning the premises, nor of the ensuing questions, but for the manifestation and declaration of a clear truth and of the said laws and statutes already planted, and for many ages past settled in this kingdom." One of these questions was as follows:—"Whether the judges of the King's Bench, or any other judges of gaol delivery or any other court, and by what law, do or can deny the copies of indictments of felony or treason to the parties accused, contrary to law?" The Lords delivered these questions to the judges, who took time to consider them, and in May, 1641, delivered the following answer:—(a) "That neither the justices of the King's Bench (as they inform us that are of that court), or justices of gaol delivery, or of any other court, do or can by any law they know, deny the copies of indictments of felony or treason to the party only accused, as by said question is demanded." The House of Commons not being satisfied with the answers which the judges made upon some of the questions, made what was called a declaration upon all the points

(a) See Nalson's Collection of the Great Affairs of State, 1st vol. p. 587, Lond. 1683, in which the answers of the judges are preserved, the journals of the Irish House of Lords for 1641 having been burned. And see also a very learned and interesting note, treating more at large upon this important subject, appended by Sir Colman O'Loughlin to *Neill's case* (Irish Circ. Rep. p. 375).

submitted to the judges, and upon this particular subject declared that "the judges of the King's Bench, or justices of gaol delivery, or the judges of any other court, ought not to deny copies of indictments of felony or treason to the party indicted." This affords strong evidence that at common law in Ireland a prisoner was entitled to a copy of the indictment against him. But even if a prisoner is not entitled to a copy of an indictment in cases of felony, there can be no doubt that the court have a discretion to grant it^(a), and this is a proper case in which to exercise that discretion, being the first prosecution under a new act which alters the nature of a crime for which, had the prisoner been indicted before the act passed, he would have been entitled to a copy of the indictment by express statute: (*Rosewell's case*, 10 St. Tr. 261, 266.) [LEFROY, B.—At what stage of the proceedings was the application made in *Rosewell's case*?] Both before pleading (10 St. Tr. 152), and afterwards in arrest of judgment (*ib.* 266). With respect to the rest of the motion, it is not necessary to apply for a copy of the present panel, as that has been given by the sheriff, but we ask for a copy of the panels of jurors summoned at the three preceding commissions. They are matters of record in the Crown Office, and as such we ought to have access to them; Lord Coke, in his preface to 2nd vol. Rep. p. 6, says that "the records of the King's Courts are safely kept, yet not so kept but that any subject may for his own use and benefit have access thereunto, which was the ancient law of England, and so is declared by an Act of Parliament." By statute 46 Edw. 3, it was enacted that all persons shall for the future have free access to them, and may have exemplifications of them, whether it makes for or against the King (1 Blackst. 39; *Rex v. Worsenham and another*, 1 Lord Ray. 705; *Herbert v. Ashburner*, 1 Wils. 297; *Rex v. Smith*, 1 Str. 126.)

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ment refused.

The Attorney-General and Balwin, Q. C., opposed the motion. —If this application is granted, it will be a departure from the settled practice at this court, in the Queen's Bench, and on circuit. *Rex v. Holland* (4 T. R. 693); *Browne v. Cumming* (10 B. & C. 70), show that the court will grant such an application after an acquittal, in order to enable the defendants to maintain an action for a malicious prosecution; but not in such a case as the present. With regard to the question of the discretionary power of the court to grant a copy of the indictment, all the authorities show that the prisoner has no right to it (2 Hale's P. C. 236; Fost. Cr. C. 228; 2 Hawk. P. C. 557, sect. 14); and some very conclusive authority in favour of such an application ought to be shown to coerce the court to vary the practice of centuries.

Sir Colman O'Loghlen.—The prisoner's counsel could not demur to this indictment if they have not a copy of it. If the court do not permit the defendant to have a copy, he will be obliged to get a short-hand writer to take a note of it, and it will be the duty of the Clerk of the Crown to read it *slowly and distinctly* (see 1

(a) See *Reg. v. Grace* (2 Cox's Cr. C. p. 101).

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Lewin's Cr. C. 207, n.) to enable him to do so. The object of the prisoner in seeking copies of the former panels is to be in a position to challenge the array, if it appears that a different class of jurors have been impannelled to try this case from that usually impannelled for trials at this court; or if it appears that the names of jurors have been placed on the panel in such a way as to prejudice the prisoner. I do not impute such conduct to the sheriff; all we seek is to get such information as is necessary to enable us to exercise a constitutional right, without which, in the words of Lord Denman, trial by jury would be "a delusion, a mockery, and a snare."

Copy of indictment refused.

LEFROY, B.—This motion must be refused. The law is clear and express upon the point, as laid down by Lord Hale, (2 Hale, P. C. 236;) Hawkins, (1 Hawkins, P. C. 369;) and Foster, (Disc. of High Treason, 228;) and the practice is stated accordingly by Lord Kenyon: (*Rex v. Holland*, 4 T. R. 692—3.) No case to the contrary has been cited to us to show that a prisoner, in this stage of the proceedings, is entitled to a copy of the indictment. The act entitling a prisoner to this privilege in cases of high treason, and the more recent act, 1 Geo. 4, c. 4, s. 8, granting it in cases of *ex officio* informations in cases of misdemeanors, would alone be sufficient to show that by the common law a prisoner had no such right; we conceive, therefore, that we have no authority to grant this application, and that it would be mischievous to break in upon a long-established practice, sanctioned by the highest authorities; and a course of uniform practice for a long period down to the present time. The argument urged by the prisoner's counsel that the prisoner may require the indictment to be read so slowly as to allow of its being taken down by a short-hand writer, and much time be thereby unnecessarily occupied, cannot avail. No decision or rule of a court of justice could be made to depend on the length of an indictment, or the time which it would take to have it read. There cannot be a different rule for a short indictment and a long one. As to the application for copies of the preceding panels, the prisoner has no right to them, and the authorities referred to, on the other point, show that he had just as little to receive a copy of the present panel. But as he has received it no question arises regarding it. As to the use proposed to be made of the former panels, to show that the present panel differs from them in some respects, it should be recollected that every sheriff has his own duty to perform, and must act upon his own discretion, and accordingly the Jury Act (3 & 4 Will. 4, c. 91, s. 11), expressly provides "that nothing therein contained shall be construed to prevent any sheriff or returning officer in making returns to any writ of *venire* or precept from exercising his discretion in framing the panel annexed to such returns in such manner as he is now by law directed to do, save only so far as to prevent the insertion in such panel of any names not contained in the said jurors' book." This is the law of the land applicable to all

cases, and we have no authority to hold a doctrine contrary to it in this particular case.

MOORE, J.—I fully concur in the decision to which Baron Lefroy has come. I will not lay down the broad abstract principle that in no case a copy of the indictment should be granted, but having seen a copy of the indictment in this case, I do not see any sufficient reason why in the exercise of the discretion of the court a copy of it should be furnished to the prisoner's counsel, and on an appeal to our discretion, the worst argument that can be used is the threat, that a large portion of time will be consumed in reading the indictment, so as to enable a short-hand writer to take a note of it. As regards the application for a copy of former panels, I cannot see what connexion exists between the panel of the present sheriff and those prepared by former sheriffs, and I am bound to presume that in the present instance the sheriff has acted in the discharge of his duty, as the law allows him.

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The prisoner being then put forward to the bar :

The indictment was, at the request of *Sir Colman O'Loghlen*, read out slowly, and at full length, so as to enable a short-hand writer to take a note of it.

The reading of the indictment having been concluded, the prisoner was again called on to plead, upon which *Sir Colman O'Loghlen* requested as a matter of favour that Mr. Mitchel might not be compelled to plead until to-morrow, as he meant to move that the indictment be quashed, on the ground that it charged two distinct felonies, which might have been made the subject of separate indictments. He was not then prepared to argue the question ; but the case of *Young, in error, v. The King* (3 T. R. 89, 106), was an authority in favour of the objection upon which he meant to rely.

The *Attorney-General* assented to the prisoner's not being called upon to plead until the following day, upon the understanding that the motion to quash the indictment should be proceeded with the first thing on that day.

Sir Colman O'Loghlen.—We apply for a bill of particulars as regards the two last counts, the charges in which are of a most general kind.

The *Attorney-General* gave an undertaking that the charges contained in those counts (the 9th and 10th), should be confined to the matters specified in the previous counts of the indictment.

May 23.

Sir Colman O'Loghlen (with whom was *J. E. Pigot and J. O'Hagan*).—I have now on behalf of Mr. Mitchel to move that the indictment in this case be quashed, as it charges the prisoner with two distinct felonies:—compassing to deprive

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Indictment.

1st count.

and depose the Queen from the style, honour, and royal name of the Imperial crown of the United Kingdom; and compassing to levy war, in order by force and constraint to compel Her Majesty to change her measures and counsels. (a)

(a) The indictment, which is the first which has been framed under the statute 11 Vict. c. 12, "An Act for the better Security of the Crown and Government of the United Kingdom," was as follows:—

FIRST COUNT.—*County of the City of Dublin, to wit.*—The jurors for our Lady the Queen upon their oath present, that John Mitchel, late of Ontario Terrace, in the county of Dublin, gentleman, after the passing of an Act of Parliament, made and passed in the eleventh year of the reign of our Sovereign Lady Queen Victoria, entitled "An Act for the better Security of the Crown and Government of the United Kingdom," to wit, on the sixth day of May, in the eleventh year of the reign of our said Sovereign Lady Queen Victoria, with force and arms, at the parish of Saint Thomas, in the county of the city of Dublin, within the United Kingdom, feloniously did compass, imagine, invent, devise, and intend to deprive and depose our said Lady the Queen from the style, honour, and royal name of the Imperial crown of the United Kingdom, and the said felonious compassing, imagination, invention, devise, and intention, he the said John Mitchel then and there feloniously did express, utter, and declare by then and there feloniously publishing a certain printing in a certain public newspaper, called the *United Irishman*, of which said public newspaper he the said John Mitchel then and there was the proprietor, which said printing is as follows, that is to say,

Mr. Mitchel (meaning the said John Mitchel) having been loudly called, then rose amidst a hurricane of applause, and said—Mr. Chairman and citizens of Limerick, my first duty is to thank you, which I do cordially and sincerely, for the generous reception you have this night given to those who have been selected for prosecution by the British Government—a reception which, notwithstanding what has occurred outside that door, must be called a triumphant one—(hear, hear.) I have seen nothing in all this mob violence to make me despond for a moment. The people are the true source of legitimate power; that howling multitude outside are a thousand times preferable to the howling legislators of England who yelled against Smith O'Brien—(cheers.) I am no drawing-room democrat, who can discourse of the powers and virtues of the people only while they are smiling and cheering around me. Mob-law itself, in Ireland, is far better than government law—that well-ordered and civilized system that slays its million of human beings within the year. I tell you that rather than endure one other year of British dominion, I would take a provisional government selected out of the men that are bellowing there in the street—(loud cheers.) Sir, I fear that I am unfortunately the cause of your meeting this night being disturbed—(no, no.) I think, however, the matter arises out of a misapprehension. There is a great difference surely between bearing testimony to one's approval of a man's general conduct, and identifying oneself with all his acts—(hear.) It is one thing to offer encouragement and support to a person singled out by government (which is the enemy of us all) as the especial object of its vengeance; and it is quite another thing to adopt for your own every particular sentiment, saying, and doing, of the individual in question. This difference I feel bound to note and acknowledge to-night; and I do so with alacrity and with gratitude. You need not fear, my friends, that I will misinterpret the compliment that has been paid me, in inviting me to your city on this occasion. You need not fear that I have accepted your invitation in order that I might thrust any particular opinions of my own down your throats (hear, hear), or in order to induce a belief that there is between me and your distinguished guests—Smith O'Brien and Thomas Meagher—a more thorough identification than there is or needs to be. We don't want this thorough identification—(hear.) Some of the things I have done and written these gentlemen have both condemned, as believing either that they were wrong in themselves, or that the time had not come for them. And I cannot be even with my friends in this matter—I am not able to repudiate any of their public acts. Can I repudiate, for instance, the last speech of Mr. O'Brien in the British Parliament—one of the noblest, clearest statements of Ireland's case—the very haughtiest, grandest defiance flung in the face of Ireland's enemies that ever yet fell from the lips of man?—(loud cheers.) Or can I condemn the alternative put by Mr. Meagher, who says, when the last constitutional appeal shall be made, and shall fail—"Then up with the barricades, and invoke the God of Battles?"—(great cheering.) Can I repudiate this—who hold that constitutional appeals are long since closed against us, and that we have even now no resource, except—when we have the means and the pluck to do it—the barricades and the God of Battles?—(hear, hear, and loud cheers.) No; all the seditions and treasons of these gentlemen I adopt and accept, and I ask for more—(hear, hear.) Whatever has been done or said by the most disaffected person in all Ireland against the existence of the party which calls itself the government—nothing can go too far for me. Whatever public treasons there are in this land, I have stomach for them all—(loud cheering.) But, sir, have we not had in Ireland somewhat too much of this adopting and avowing, or also repudiating and disavowing what has been said or done by others? Might we not, perhaps, act with advantage less as parties, and more as mere men, each of us on his own individual responsibility?—(hear, hear.) For myself, though an active member of the Irish Confederation, I declare that I do not belong to the Young Ireland party, or to any party. I have found myself unsuited to party ties and trammels altogether; I have been found not to

The practice is, when the objection is taken before plea, to quash the indictment, and when after plea, to put the prosecutor to his election. I admit that the objection is not available in arrest of judgment and that it is not the ordinary practice to

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draw quietly either in single or double harness—(hear, hear, and laughter.) I very soon quarrelled with the old Repeal Association; and as for the Confederation, it has once or twice nearly quarrelled with me. Not many weeks ago the council of the Confederation, headed by Smith O'Brien and Mr. Meagher, thought it necessary to disavow my proceedings. Very well; what harm came of it? I merely retorted in the most good humoured way in the world, by setting them at defiance; and things went on afterwards more smoothly than ever—(cheers, and laughter.) In short, I have long felt that I belong to a party of one member—a party whose basis of action is to think and act for itself—whose one fundamental rule is to speak its mind—(cheers.) Its secretary, committee, librarian, and treasurer are all one in the same person; and in its proceedings, I assure you, there reigns the most unbroken unanimity—(continued laughter.) Seriously, sir, I know no other way of ensuring both honest unanimity, and independent co-operation, than this very way of mine; and with these views and sentiments, you may be sure I am not likely to misconceive the motive of your kindness in asking me to join your party to-night. I am here, I believe, as your guest on one account alone. You will say whether I state it truly. I am here not as a Jacobin (which I am not), nor as a Communist (which I am not), nor even as a Republican (which I am,)—(loud cheers); but simply and merely because I am a bitter and irreconcilable enemy to the British Government—(hear, hear.) Will you forgive me for speaking so much about myself, on this the first time I have had the honour to address an audience in the south of Ireland—(hear, hear.) I assure you it is not my habit; nor would I do so to-night, but that I found myself, on my arrival in Limerick to-day, in a rather singular position. I found some twenty or thirty poor fellows who had risen very early in the morning for no other purpose but to hoot me as I came into town. I have no ill will, I assure you, against those who hooted, nor even against those who set them on to hoot—(hear.) I believe it all arose out of some expressions in my paper, *The United Irishman*—(loud cheers for *The United Irishman*), which were construed as disrespectful to the memory of one whom—whatever I may think of him—most Catholics revere as their Emancipator. I think the passage did not really convey the gross and degrading imputation on O'Connell's memory that has been spelled out of it; but at any rate I must acknowledge that the feeling on the part of these people against me is not an unnatural one, and that is merely an exaggerated and perverted example of a sentiment creditable in itself—(hear.) But, sir, while I admit this, I must also insist on my right to hold and to express, on all public questions, and on the characters of public men, the opinions which I have honestly formed—(cheers.) I established that paper in order to assert and vindicate this right, as well as all other rights of Irishmen, and especially the rights of labouring people like my friends who hooted me this morning. And I must inform them that I value the hootings of a mob just as little as the indictment of an Attorney-General—(hear, hear, and cheers.) And further, that I had rather never be invited to a public assembly, nor appear in a public place, nor sit at good men's feasts,—I had rather be overwhelmed by state prosecutions, and by the execration of my countrymen, all at once, than yield or waive the privilege of saying what I think for a single hour—(hear, hear, and great cheering.) Enough now about these personal matters. As to the position of our great cause, I think it is full of peril as well as full of hope. In proportion as the Irish nation has been gathering up strength and spirit to rid its soil of their enemies, those enemies have also been collecting their strength and hardening their hearts to hold our country in our despite. It is fortunate, I think, that those who have taken a forward part in rousing our people to these hopes and efforts, are the first to bear the brunt of the danger. It is better that they should be called to encounter it in the courts of justice first, than that it should fall on a people not yet prepared in the field. But while we meet the enemy in the Queen's Bench, we have a right to call upon you to sustain us by a firm and universal avowal of your opinion. On the constituents of Smith O'Brien especially devolves this duty. While the British Parliament calls his exertions "treason" and "felony," it is for his constituents to declare that in all this treason and felony he is doing his duty by them—(cheers.) And more than this; it is your duty further to prepare systematically to sustain him, if it come to that, in arms—(loud and enthusiastic cheering.) May I presume to address the women of Limerick—(hear, hear, and loud cheers.) It is the first time I have ever been in the presence of the daughters of those heroines who held the breach against King William; and they will understand me when I say, that no Irishwoman ought so much as to speak to a man who has not provided himself with arms—(loud cheering.) No lady is too delicate for the culinary operation of casting bullets—(laughter.) No hand is too white to make up cartridges (cheers); and I hope, if it be needful to come to the last resort, that the citizens of Limerick, male and female, will not disgrace their paternal and maternal ancestors—(hear, hear, and cheers.) Before sitting down now, I wish to contradict one calumny. It has been said of me—Lord Clarendon has had it posted up over Dublin—that I have been inciting the people to plunder and massacre; that my object is to raise a hasty and immature insurrection; that I want to plunder houses, to rob banks, to break into shops and stores. Need I refute this outrageous calumny?—(cries of "no, no," and cheers.) Who ever heard me stimulate my countrymen to civil war against

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quash indictments for serious offences such as treasons. But in *Young v. The King* (3 T. R. 106), Buller, J., when speaking of an objection similar to the present, says, "as to the remaining objection, that is founded on a point which once embarrassed me a

their own flesh and blood? My friends, we have no enemies here save the British Government and their abettors. A war of assassination and plunder against our countrymen would be a wound to our own vitals—(hear and cheers.) I shall say no more of this; but again heartily thanking you for your kindness, I conclude by urging you once more to stand by and sustain Smith O'Brien against his enemies and yours—to sustain him, not for his sake, but for your own.

If yet you are not lost to common sense,
Assist your patriot in your own defence.
The foolish cant—he went too far—despise,
And know that to be brave is to be wise.

Mr. Mitchel (meaning the said John Mitchel) sat down amidst protracted cheering. And the said felonious compassing, imagination, invention, device, and intention, he the said John Mitchel afterwards, to wit, on the thirteenth day of May, in the eleventh year of the reign of our said Lady the Queen, to wit, at the parish aforesaid, in the county of the city of Dublin aforesaid, did further feloniously express, utter, and declare, by then and thero feloniously publishing a certain other printing in one other number of the said public newspaper called *The United Irishman*, which is as follows; that is to say,

THE TIMES ON REBELLIONS.

The Times appears to have been labouring under the impression that Mr. Mitchel (meaning the said John Mitchel) had given himself out for a "hero," and the leader of a rebellion, and further, that the three prosecuted confederates went to Limerick to fight a pitched battle, instead of to attend a peaceful evening party. Now the fact is, the editor of *The United Irishman* (meaning the said John Mitchel) is no hero at all, and never said he was. He (meaning the said John Mitchel) has only endeavoured to persuade his countrymen that they will never gain their liberties, except by fighting for them; and that the only arguments the English Government will understand are the points of pikes—that's all. And he (meaning the said John Mitchel) continues to preach this saving doctrine, and will continue so to do until a considerable number of his countrymen agree with him (meaning the said John Mitchel), and then he hopes to aid in enforcing the arguments practically—that's all. As to the "sneaking away" of Mr. Mitchel and Mr. Meagher, or either of them, "under the protection of police," or any protection, it is merely an untruth, and the writer in *The Times* who wrote it, and the editors of *Saunders* and *The Mail* who, we find, have copied it, knew it to be an untruth.

And, in another part of the said last-mentioned number of the said public paper called *The United Irishman*, a certain other printing, which is as follows; that is to say,

Letter to the Protestant Farmers, Labourers, and Artizans of the North of Ireland.

No. II.

My Friends,—Since I wrote my first letter to you, many kind and flattering addresses have been made to you by exceedingly genteel and very rich noblemen and gentlemen. Those of you, especially, who are Orangemen, seem to have somehow got into high favour with this genteel class, which must make you feel rather strange, I think:—you have not been used to much recognition and encouragement of late years from British Viceroy, or the noble and right worshipful Grand Masters. They rather avoided you; seemed, indeed, as many thought, somewhat ashamed of you and your old anniversaries. Once upon a time no Irish nobleman or British minister dared make light of the colours of Aughrim and the Boyne. But can you divine any cause for the sudden change of late? Do you understand why the Whig, Lord Clarendon, calls you so many names of endearment, and the Earl of Enniskillen tenderly entreats you as a father his only child? Can these men want anything from you?

Let us see what the drift of their addresses generally is. Lord Clarendon, the English governor, congratulates you on your "loyalty," and your "attachment to the constitution," and seems to calculate, though I know not why, upon a continuance of those exalted sentiments in the North. Lord Enniskillen, the Irish nobleman, for his part, cautions you earnestly against Popery and Papists, and points out how completely you would be overborne and swamped by Catholic majorities in all public affairs.

My Lord Enniskillen does not say a word to you about, what is, after all, the main concern, the tenure of your farms, not one word. It is about your Protestant interest he is uneasy. He is apprehensive, not lest you should be evicted by landlords, and sent to the poor-house, but lest purgatory and seven sacraments should be thrust down your throats. This is simply a Protestant pious fraud of his Lordship's, merely a right worshipful humbug. Lord Enniskillen, and every other commonly informed man, knows that there is now no Protestant interest at all; that there is absolutely nothing left for Protestant and Catholic to quarrel for: even the church establishment is not a Catholic and Protestant question, inasmuch as all dissenters, and all plebeian churchmen, are as much concerned to put an end to that nuisance as Catholics are. Lord Enniskillen knows, too (or, if he do not, he is the very stupidest Grand Master in Ulster), that an ascendancy of one sect over another is from henceforth impossible, the fierce religious zeal that animated our fathers on both sides is utterly dead and

great deal. Some years have elapsed since I looked into it; but I believe I can state pretty accurately how it stands. In misde-
meanors the case in Burrow shows that it is no objection to an indictment that it contains several charges. *The case of felonies*

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gone;—I do not know whether this is for our advantage or not; but, at any rate, it is gone: nobody in all Europe would now so much as understand it, and if any man talks to you now of religious sects, when the matter in hand relates to civil and political rights, to administration of government, and distribution of property,—depend on it, though he wear a coronet on his head, he means to cheat you. In fact, religious hatred has been kept alive in Ireland longer than anywhere else in Christendom, just for the simple reason that Irish landlords and British statesmen found their own account in it: and so soon as Irish landlordism, and British dominion are finally rooted out of the country, it will be heard of no longer in Ireland, any more than it is in France or Belgium now.

Indictment.
—
1st count.

If you have still any doubt whether Lord Enniskillen meant to cheat you, I only ask you to remember, *first*, that he has written you a long and paternal letter, upon the state of the country, and has not once alluded to your tenant-right; and, *second*, that he belongs to that class of persons from whom *alone* can come any danger to your tenant-right,—which is your life and property.

As for Lord Clarendon and his friendly addresses, exhorting to “loyalty” and attachment to institutions of the country, I need hardly tell you that *he* is a cheat. What institutions of the country are there to be attached to? That all who pay taxes should have a voice in the outlay of those taxes is not one of our institutions,—that those who create the whole wealth of the state by their labour should get leave to live, like Christians, on the fruits of that labour,—*this* is not amongst the institutions of the country. *Tenant-right* is not an institution of the country. No; out-door relief is our main institution at present—our *Magna Charta*—our Bill of Rights. A high paid church and a low-fed people, are institutions; stipendiary clergymen, packed juries, a monstrous army and navy, which we pay, not to defend, but to coerce us,—these are institutions of the country. Indian meal, too, strange to say, though it grows four thousand miles off, has come to be an institution of this country. Are these the “venerable institutions” you are expected to shoulder your muskets to defend?

But, then, “Protestants have always been *loyal* men.” Have they? And what do they mean by “loyalty?” I have never found that, in the north of Ireland, this word had any meaning at all, except that we, Protestants, hated the Papists, and despised the French; this, I think, if you will examine it, is the true theory of “loyalty” in Ulster. I can hardly fancy any of my countrymen so brutally stupid as to really prefer high taxes to low taxes,—to be really proud of the honor of supporting “the Prince ALBERT,” and his lady, and their children, and all the endless list of cousins and uncles that they have, in magnificent idleness, at the sole expense of half-starved labouring people. I should like to meet the northern farmer, or labouring man, who would tell me, in so many words, that he prefers dear government to cheap government; that he likes the House of Brunswick better than his own house;—that he would rather have the affairs of the country managed by foreign noblemen and gentlemen than by himself and his neighbours; that he is content to pay, equip, and arm an enormous army, and give the command of it to those foreign noblemen, and to be disarmed himself, or *liable* to be disarmed, as you are, my friends, at any moment. I should like to see the face of the Ulsterman, who would say plainly that he deems himself unfit to have a voice in the management of his own affairs, the outlay of his own taxes, or the government of his own country. If any of you will admit this, I own he is a loyal man, and attached to our venerable institutions; and I wish him joy of his loyalty, and a good appetite for his yellow meal.

Now, Lord Clarendon and Lord Enniskillen want you to say all this. The Irish noble and the British statesman want the very same thing: they are both a tale. The Grand Master knows that if you stick by your loyalty, and uphold British connexion, you secure to him his coronet, his influence, and his rental;—discharged of tenant right, and all plebeian claims. And Lord Clarendon knows, on his side, that if you uphold landlordism and abandon tenant right, and bend all your energies to resisting the “encroachments of popery,” you thereby perpetuate British dominion in Ireland, and keep the “Empire” going yet a little while. Irish landlordism has made a covenant with British government, in these terms,—“keep down for me my tenantry, my peasantry, my ‘masses,’ in due submission, with your troops and laws;—and I will garrison the island for you, and hold it as your liege-man and vassal, for ever.”

Do you not know, in your very hearts, that this is true? And still you are “loyal” and attached to the institutions of the country!

I tell you frankly, that I, for one, am not “loyal.” I am not wedded to the Queen of England, nor unalterably attached to the House of Brunswick. In fact, I love my own barn better than I love that house. The time is long past when Jehovah *anointed* Kings. The thing has long since grown a monstrous imposture, and has been already, in some civilised countries, detected as such, and drummed out accordingly. A modern king, my friends, is no more like an ancient anointed Shepherd of the people than an Archbishop’s apron is like the *Urim* and *Thummim*. There is no divine right now but in the Sovereign people.

And for the “Institutions of the Country,” I loathe and despise them; we are sickening and dying of these institutions fast; they are consuming us like a plague, degrading us to

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admits of a different consideration, but even in such it is no objection *at this stage* of the prosecution. On the face of an indictment every count imports to be for a different offence, and is charged as at different times, and it does not appear on the record whether

paupers in mind, body, and estate—yes, making our very souls beggarly and cowardly. They are a failure and a fraud, these institutions;—from the topmost crown jewel to the meanest detective's note book there is no soundness in them, God and man are weary of them. Their last hour is at hand; and I thank God that I live in the days when I shall witness the utter downfall, and trample upon the grave, of the most portentous, the grandest, meanest, falsest, and cruellest tyranny that ever deformed this world.

These, you think, are strong words; but they are not one whit stronger than the feeling that prompts them—that glows this moment deep in the souls of moving and awakening millions of our fellow countrymen of Ireland,—ay, and in *your* souls, too, Protestants of Ulster, if you would acknowledge it to yourselves. I smile at the formal resolution about "loyalty to Queen Victoria," so eagerly passed and hurried over as a dubious kind of form at tenant right meetings and "Protestant Repeal" meetings. I laughed outright here, on Tuesday night last, at the suspicious warmth with which Dublin merchants, as if half afraid of themselves, protested so anxiously that they would yield in *loyalty* to none. They, Democrats by nature and position, meeting there without a nobleman to countenance them; with the Queen's representative scowling black upon them from his castle, are,—they declare it with most nervous solemnity—*loyal men*. Indeed, it was easy to see that a vague feeling was upon them of the real meaning and tendency of all these meetings,—of what all this must end in, and to what haven they and you, and we, are all, in a happy hour, inevitably drifting together.

My friends, the people's sovereignty: the land, and sea, and air of Ireland, for the people of Ireland; this is the gospel that the Heavens and the earth are preaching, and that all hearts are secretly longing to embrace. Give up for ever that old interpretation you put upon the word "Repeal."

REPEAL is no priest-movement; it is no sectarian-movement; it is no money-swindle, nor "eighty-two" delusion, nor puffery, nor O'Connellism, nor Mullaghmast "green cap" stage play, nor loud-sounding inanity of any sort, got up for any man's profit or praise. It is the mighty passionate struggle of a nation hastening to be born into new national life; in the which unspeakable throes all the parts, and powers, and elements of our Irish existence,—our Confederations, our Protestant Repeal Associations, our Tenant-right Societies, our Clubs, Cliques, and Committees, amidst confusions enough and the saddest jostling and jumbling,—are all inevitably tending, however unconsciously, to one and the same illustrious goal,—*not* a local Legislature,—*not* a return to "our ancient constitution," not a golden link, or a patch-work Parliament, or a College-green chapel-of-ease to Saint Stephen's—but an IRISH REPUBLIC, one and indivisible. And how are we to meet that day? *In arms*, my countrymen, in arms. Thus, and not otherwise, have ever nations of men sprung to liberty and power.—But why do I reason thus with you,—with you, the Irish of Ulster, who never have denied the noble creed and Sacraments of manhood? *You* have not been schooled for forty years in the fatal cant of moral force—you have not been utterly debauched and emasculated by the clap-trap platitudes of public meetings, and the empty glare of "imposing demonstrations;" you have not yet learned the litany of slaves, and the whine of beaten hounds, and the way to die a coward's death. No; let once the great idea of your country's destiny seize on *you*, my kinsmen, and the way will be plain before you as a pike-staff twelve feet long.

Yet there is one lesson you must learn—fraternal respect for your countrymen of the south, and that sympathy with them, and faith in them, without which there can be no vital nationality in Ireland. You little know the history and sore trials and humiliations of this ancient Irish race; ground and trampled first for long ages into the very earth, and then taught—expressly *taught*—in solemn harangues, and even in sermons, that it was their duty to die, and see their children die before their faces, rather than resist their tyrants as men ought. *You* can hardly believe that creatures with the gait and aspect of men could have been brought to this. And you cannot wonder that they should have been slow, slow in struggling upward out of such darkness and desolation. But I tell you the light has at length come to them: the flowery spring of this year is the dawning of their day; and before the corn fields of Ireland are white for the reaper, our eyes shall see the sun flashing gloriously, if the Heavens be kind to us, on a hundred thousand pikes. I will speak plainly. There is now growing on the soil of Ireland a wealth of grain, and roots, and cattle, far more than enough to sustain in life and in comfort all the inhabitants of the island. *That wealth must not leave us another year*,—not until every grain of it is fought for in every stage, from the tying of the sheaf to the loading of the ship. And the effort necessary to that simple act of self-preservation will at one and the same blow prostrate British dominion and landlordism together. 'Tis but the one act of volition—if we resolve but *to live*, we make our country a free and Sovereign state.

Will *you* not gird up your loins for this great national struggle, and stand with your countrymen for life and land? Will *you*, the sons of a warlike race, the inheritors of conquering memories,—with the arms of freemen in all your homes, and relics of the gallant republicans of ninety-eight for ever before your eyes—will *you* stand folding your hands in helpless "loyalty;"—and while every nation in Christendom is seizing on its birth-right with armed hands, will *you* take patiently with your rations of yellow meal, and your inevitable portion of eternal

the offences are or are not distinct. But if it appear before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his

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contempt? If this be your determination, Protestants of Ulster, then make haste, sign addresses of loyalty and confidence in Lord Clarendon, and protest, with that other Lord, your unalterable attachment to "our venerable institutions." JOHN MITCHEL.
Against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

SECOND COUNT.—And the jurors aforesaid, upon their oath, do further present that the said John Mitchel, after the passing of the said Act of Parliament made and passed in the said eleventh year of the reign of our said Sovereign Lady Queen Victoria, entitled "An Act for the better Security of the Crown and Government of the United Kingdom," to wit, on the sixth day of May, in the said eleventh year of the reign of our said Lady the Queen, to wit, at the parish of Saint Thomas, in the county of the city of Dublin, within the United Kingdom, feloniously did compass, imagine, invent, devise, and intend to deprive and depose our said Lady the Queen from the style, honour, and royal name of the Imperial crown of the United Kingdom, and the said felonious compassing, imagination, invention, device, and intention, he the said John Mitchel then and there feloniously did express, utter, and declare, by then and there feloniously publishing a certain printing in a certain public newspaper called *The United Irishman*, of which he, the said John Mitchel, then and there was the proprietor, which said printing is as follows, that is to say [here the prisoner's speech at Limerick is set out, with the innuendoes, as in the first count], against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. 2nd count.

THIRD COUNT.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Mitchel, after the passing of the said Act of Parliament made and passed in the eleventh year of our said Sovereign Lady Queen Victoria, entitled "An Act for the better Security of the Crown and Government of the United Kingdom," to wit, on the thirteenth day of May, in the said eleventh year of our said Lady the Queen, to wit, at the parish of Saint Thomas, in the county of the city of Dublin, within the United Kingdom, feloniously did compass, imagine, invent, devise, and intend to deprive and depose our said Lady the Queen from the style, honour, and royal name of the Imperial crown of the United Kingdom, and the said felonious compassing, imagination, invention, device, and intention, he, the said John Mitchel, then and there feloniously did express, utter, and declare, by then and there feloniously publishing a certain printing in a certain public newspaper called *The United Irishman*, of which he, the said John Mitchel, then and there was the proprietor, which said printing is as follows, that is to say [here the article entitled '*The Times on Rebellions*' is set out, with the innuendoes, as in the first count], and in another part of the said last-mentioned number of the said public newspaper called *The United Irishman*, a certain other printing, which is as follows, that is to say [here the "Letter to the Protestant Farmers, Labourers, and Artisans of the North of Ireland, No. II., is set out, with the innuendoes, as in the first count], against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity. 3rd count.

FOURTH COUNT.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Mitchel, after the passing of the said Act of Parliament made and passed in the eleventh year of our said Sovereign Lady Queen Victoria, entitled "An Act for the better Security of the Crown and Government of the United Kingdom," on the sixth day of May, in the said eleventh year of the reign of our said Lady the Queen, at the parish of Saint Thomas, in the county of the city of Dublin, within the United Kingdom, feloniously did compass, imagine, invent, devise, and intend to deprive and depose our said Lady the Queen from the style, honour, and royal name of the Imperial crown of the United Kingdom, and the said felonious compassing, imagination, invention, device, and intention did then and there feloniously express, utter, and declare, by divers overt acts and deeds hereinafter mentioned, that is to say, in order to fulfil, perfect, and bring to effect his most evil and wicked felony and felonious compassing, imagination, invention, device, and intention aforesaid, he, the said John Mitchel, on the said sixth day of May, in the eleventh year of the reign aforesaid, at the said parish of Saint Thomas, in the county of the city aforesaid, feloniously did publish a certain printing in a certain public newspaper called *The United Irishman*, of which said public newspaper he, the said John Mitchel, then and there was the proprietor, which is as follows, that is to say [setting out the prisoner's speech at Limerick, and the innuendoes, as in the first count], and further to fulfil, perfect, and bring to effect his most evil and wicked felony and felonious compassing, imagination, invention, device, and intention aforesaid, he, the said John Mitchel, on the thirteenth day of May, in the eleventh year of the reign aforesaid, at the parish of Saint Thomas, in the county of the city of Dublin aforesaid, feloniously did publish a certain printing in a certain public newspaper called *The United Irishman*, of which said public newspaper he, the said John Mitchel, then and there was the proprietor, which is as follows, that is to say [setting out the article entitled '*The Times on Rebellions*,' with the innuendoes, as in the first count]. And further to fulfil, perfect, and bring to effect his most evil and wicked felony and felonious compassing, imagination, invention, device, and intention aforesaid, he, the said John Mitchel, on the thirteenth day of May, in the eleventh year of the reign aforesaid, 4th count.

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defence, or prejudice him in his challenge of the jury; for he might object to a jurymen's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge who tries the

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at the parish of Saint Thomas, in the county of the city of Dublin aforesaid, feloniously did publish a certain printing in a certain public newspaper called *The United Irishman*, of which said public newspaper he, the said John Mitchel, then and there was the proprietor, which is as follows, that is to say [here the letter to the Protestant Farmers, Labourers, and Artizans of the North of Ireland, No. II., was set out, with innuendoes, as in the first count], against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

5th count.

FIFTH COUNT.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Mitchel, after the passing of the said Act of Parliament made and passed in the eleventh year of our said Sovereign Lady Queen Victoria, entitled "An Act for the better Security of the Crown and Government of the United Kingdom," to wit, on the sixth day of May, in the said eleventh year of the reign of our said Lady the Queen, to wit, at the parish of Saint Thomas, in the county of the city of Dublin, within the United Kingdom, feloniously did compass, imagine, invent, devise, and intend to levy war against our said Lady the Queen within that part of the United Kingdom called Ireland, in order by force and constraint to compel her to change her measures and counsels, and the said felonious compassing, imagination, invention, device, and intention, he, the said John Mitchel, then and there feloniously did express, utter, and declare, by then and there feloniously publishing a certain printing in a certain public newspaper called *The United Irishman*, of which he, the said John Mitchel, then and there was the proprietor, which is as follows, that is to say [here Mr. Mitchel's speech at Limerick was set out, with the innuendoes, as in the first count]. And the said felonious compassing, imagination, invention, device, and intention, he, the said John Mitchel, afterwards, to wit, on the thirteenth day of May, in the eleventh year of our said Lady the Queen, to wit, at the parish aforesaid, in the county of the city of Dublin aforesaid, did further feloniously express, utter, and declare, by then and there feloniously publishing a certain other printing in one other number of the said public newspaper called *The United Irishman*, which is as follows, that is to say [here the article entitled "*The Times on Rebellions*," was set out, with the innuendoes, as in the first count]. And in another part of the said last-mentioned number of the said public newspaper called *The United Irishman*, a certain other printing, which is as follows, that is to say [here the letter to the Protestant Farmers, Labourers, and Artizans of the North of Ireland, No. II., was set out, with the innuendoes, as in first count], against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

6th count.

SIXTH COUNT.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Mitchel, after the passing of the said Act of Parliament, made and passed in the said eleventh year of the reign of our said Sovereign Lady Queen Victoria, entitled "An Act for the better Security of the Crown and Government of the United Kingdom," to wit, on the sixth day of May, in the said eleventh year of the reign of our said Lady the Queen, to wit, at the parish of Saint Thomas in the county of the city of Dublin within the United Kingdom, feloniously did compass, imagine, invent, devise, and intend to levy war against our said Lady the Queen, within that part of the United Kingdom called Ireland, in order, by force and constraint, to compel her to change her measures and counsels, and the said felonious compassing, imagination, invention, device, and intention, he, the said John Mitchel, then and there feloniously did express, utter, and declare, by then and there feloniously publishing a certain printing in a certain public newspaper called *The United Irishman*, of which he the said John Mitchel then and there was the proprietor, which said printing is as follows, that is to say [here the prisoner's speech at Limerick was set out, with the innuendoes, as in the first count], against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

7th count.

SEVENTH COUNT.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Mitchel, after the passing of the said Act of Parliament, made and passed in the said eleventh year of the reign of our said Sovereign Queen Victoria, entitled "An Act for the better Security of the Crown and Government of the United Kingdom," to wit, on the thirteenth day of May, in the said eleventh year of the reign of our said Lady the Queen, to wit, at the parish of Saint Thomas, in the county of the city of Dublin, within the United Kingdom, feloniously did compass, imagine, invent, devise, and intend to levy war against our said Lady the Queen, within that part of the United Kingdom called Ireland, in order, by force and constraint, to compel her to change her measures and counsels, and the said felonious compassing, imagination, invention, device, and intention, he, the said John Mitchel, then and there feloniously did express, utter, and declare, by then and there feloniously publishing a certain printing in a certain public newspaper called *The United Irishman*, of which he, the said John Mitchel, then and there was the proprietor, which said printing is as follows, that is to say [here the article entitled "*The Times on Rebellions*," was set out, with the innuendoes as before.] And in another part of the said last-mentioned number of the said public newspaper, called *The United Irishman*, a certain other printing, which is as follows, that is to say [here the letter to the Protestant Farmers, Labourers, and Artizans

prisoner does not discover it in time, I think he may put the prosecutor to his election on which charge he will proceed. I did it at the last sessions at the Old Bailey; and hope that, in exercising that discretion, I did not infringe on any rule of law or

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of the North of Ireland, No. II., was set out, with the innuendoes, as in the previous counts], against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

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EIGHTH COUNT.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Mitchel, after the passing of the said Act of Parliament, made and passed in the eleventh year of the reign of our said Sovereign Lady Queen Victoria, entitled "An Act for the better Security of the Crown and Government of the United Kingdom," on the sixth day of May, in the said eleventh year of the reign of our said Lady the Queen, at the parish of Saint Thomas, in the county of the city of Dublin, within the United Kingdom, feloniously did compass, imagine, invent, devise, and intend to levy war against our said Lady the Queen, within that part of the United Kingdom called Ireland, in order, by force and constraint, to compel her to change her measures and counsels, and the said compassing, imagination, invention, device, and intention did then and there feloniously express, utter, and declare, by divers overt acts and deeds hereinafter mentioned, that is to say, in order to fulfil, perfect, and bring to effect his most evil and wicked felony and felonious compassing, imagination, invention, device, and intention aforesaid, he, the said John Mitchel, on the said sixth day of May, in the eleventh year of the reign aforesaid, at the parish of Saint Thomas, in the county of the city aforesaid, feloniously did publish a certain printing in a certain public newspaper called *The United Irishman*, of which said public newspaper he, the said John Mitchel, then and there was the proprietor, which is as follows, that is to say [here Mr. Mitchel's speech at Limerick was set out, with the innuendoes, as in the first count.] And further, to fulfil, perfect, and bring to effect his most evil and wicked felony, and felonious compassing, imagination, invention, device, and intention aforesaid, he, the said John Mitchel, on the thirteenth day of May, in the eleventh year of the reign aforesaid, at the parish of Saint Thomas, in the county of the city of Dublin aforesaid, feloniously did publish a certain printing in a certain public newspaper called *The United Irishman*, of which said public newspaper he, the said John Mitchel, then and there was the proprietor, which is as follows, that is to say [here the article entitled "*The Times on Rebellions*" was set out, with innuendoes, as in the first count.] And further, to fulfil, perfect, and bring to effect his most evil and wicked felony, and felonious compassing, imagination, invention, device, and intention aforesaid, he, the said John Mitchel, on the thirteenth day of May, in the eleventh year of the reign aforesaid, at the parish of Saint Thomas, in the county of the city of Dublin aforesaid, feloniously did publish a certain printing in a certain public newspaper called *The United Irishman*, of which said public newspaper he, the said John Mitchel, then and there was the proprietor, which is as follows, that is to say [here the letter to the Protestant Farmers, Labourers, and Artizans of the North of Ireland was set out, with the innuendoes, as before], against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

8th count.

NINTH COUNT.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Mitchel, after the passing of an Act of Parliament, made and passed in the eleventh year of the reign of our said Lady Queen Victoria, entitled "An Act for the better Security of the Crown and Government of the United Kingdom," to wit, on the sixth day of May, in the eleventh year of the reign of our said Lady the Queen, at the parish of Saint Thomas, in the county of the city of Dublin, and on divers other days and times, as well before as after, within the United Kingdom, feloniously did compass, imagine, invent, devise, and intend to deprive and depose our said Lady the Queen from the style, honour, and royal name of the Imperial crown of the United Kingdom, and the said felonious compassing, imagination, invention, device, and intention did then and there feloniously express, utter, and declare, by divers overt acts and deeds hereinafter mentioned, that is to say, in order to fulfil, perfect, and bring to effect his most evil and wicked felony and felonious compassing, imagination, invention, device, and intention aforesaid, he, the said John Mitchel, on the said sixth day of May, in the eleventh year of the reign aforesaid, and on divers other days and times, both as well before as after, at the said parish of Saint Thomas, in the county of the city aforesaid, feloniously did publish divers printings in divers numbers of a certain public newspaper called *The United Irishman*, of which he, the said John Mitchel, was then and there the proprietor and publisher, containing, amongst other things, incitements, encouragements, advices, and persuasions, to move, induce, and persuade the subjects of our said Lady the Queen in that part of the United Kingdom of Great Britain and Ireland called Ireland, to fulfil and bring to effect, and to aid and assist in fulfilling and bringing to effect the aforesaid felonious compassings, imaginations, inventions, devices, and intentions; and also containing therein information, instructions, and directions to the said subjects of our said Lady the Queen, how and when the said felonious compassings, imaginations, inventions, devices, and intentions should and might be carried into effect, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

9th count.

TENTH COUNT.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Mitchel, after the passing of an Act of Parliament, made and passed in

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justice." That is the principle which has been acted on in every case where the attention of the Court has been called to the subject. I admit it is an application to the discretion of the court; but the court has never refused to exercise its discretion in quashing the indictment where its attention has been called to the fact of two separate and distinct felonies being charged in the same indictment. That this is the practice appears from *Rex v. Jones* (2 Camp. 132), in which Lord Ellenborough says, "In point of law there is no objection to a man being tried on one indictment for several offences of the same sort. It is *usual in felonies* for the judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this *practice* has never been extended to misdemeanors." In *Reg. v. Flower* (3 C. & P. 412), the same law is laid down, and in *Reg. v. Smith* (3 C. & P. 413), tried before Mr. Baron Vaughan, where the prisoner was charged in one count of the indictment with stealing two pigs, and in another with receiving them knowing them to be stolen, the prosecutor was compelled to elect on which count he would proceed and abandon the other count. In *O'Connell v. The Queen* (1 Cox's Crim. Cases, 475), Tindal, C. J., says, "It must, indeed, be conceded that the practice in the case of a prosecution for a misdemeanor so far differs from that in a prosecution for a felony, that there may be (though it is not usually the case) several counts for distinct offences contained in one and the same indictment. In that case the prosecutor is not always put to his election, as in the case of felony." I admit that there are some cases which seem to show that the court have sometimes acted contrary to this rule; but I think I shall show that there is a principle involved in this case which accounts for the deviation: in those cases there was but one offence charged in different ways; here there are two distinct felonies charged. The 3rd section of the Act, 11 Vict. c. 12,

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the eleventh year of the reign of our said Lady Queen Victoria, entitled "An Act for the better Security of the Crown and Government of the United Kingdom," to wit, on the sixth day of May, in the eleventh year of the reign of our said Lady the Queen, at the parish of Saint Thomas, in the county of the city of Dublin, and on divers other days and times, as well before as after, within the United Kingdom, feloniously did compass, imagine, invent, devise, and intend to levy war against our said Lady the Queen, within that part of the United Kingdom called Ireland, in order, by force and constraint, to compel her to change her measures and counsels, and the said felonious compassing, imagination, invention, device, and intention did then and there feloniously express, utter, and declare, by divers overt acts and deeds hereinafter mentioned, that is to say, in order to fulfil, perfect, and bring to effect his most evil and wicked felony and felonious compassing, imagination, invention, device, and intention aforesaid, he, the said John Mitchel, on the said sixth day of May, in the eleventh year of the reign aforesaid, and on divers other days and times, both as well before as after, at the said parish of Saint Thomas, in the county of the city aforesaid, feloniously did publish divers printings in divers numbers of a certain public newspaper called *The United Irishman*, of which he, the said John Mitchel, was then and there the proprietor and publisher, containing therein, amongst other things, incitements, encouragements, advices, and persuasions, to move, induce, and persuade the subjects of our said Lady the Queen, in that part of the United Kingdom of Great Britain and Ireland called Ireland, to fulfil and bring to effect, and to aid and assist in fulfilling and bringing to effect, the aforesaid felonious compassings, imaginations, inventions, devices, and intentions, and also containing therein information, instructions, and directions to the said subjects of our said Lady the Queen, how and when the said felonious compassings, imaginations, inventions, devices, and intentions should and might be carried into effect, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

creates two distinct felonies. Now in this indictment it is charged that the prisoner did compass, &c. to deprive and depose Her Majesty from the style, honour, and royal name of the Imperial crown of the United Kingdom, and another count charges that he did compass and imagine the levying war in the United Kingdom, in order by force and constraint to compel Her Majesty to change her measures and counsels. I know not whether the *Attorney-General* means to rely on the 5th section of the Act, which gives a power to allege any number of overt acts. But these are not overt acts, but actual distinct felonies. In Archbold's Crim. Law, p. 58, edit. 1846, an express distinction, on this subject, is taken between treason and felony; but what the reason of the distinction is is not stated. All the reasons given by Mr. Justice Buller, in *Young v. The King* apply in this case. A prisoner is not to escape punishment because he has committed two felonies, but, because he might choose to challenge in one case and not in the other, he ought not to be tried at the same time for both.

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LEFROY, B.—We do not think it necessary to call on the *Attorney-General* in this case.

J. O'Hagan.—Then I will refer your lordships to an additional authority, *Reg. v. Basset* (1 Cox Cr. C. 51). That case shows that where the evidence applicable to the one charge is the same as that applicable to the other, a second offence might be included in the indictment, it being all the one transaction; but that if that is not the case, the prosecutor must be put to his election. Now look at this indictment, it charges in one count an intent, on a certain day, to depose the Queen, and another count charges, on a different day, an intent to levy war. It alleges different offences committed on different days. The prisoner has, therefore, a right to a separate trial for each offence, and then would have a power of challenging forty jurors.

LEFROY, B.—We do not think it necessary to call on the *Attorney-General*, as we have had a full opportunity of considering the subject, in consequence of the announcement which was very fairly made yesterday evening, by Sir Colman O'Loughlen, of the grounds on which he intended to rest his application; and we think it of great importance, where we find the law well settled, and an established practice, not to appear to entertain any doubt upon it. We are called upon either to quash this indictment, or to put the *Attorney-General* to his election as to which of the counts he will proceed upon. It is admitted not to be an objection which will vitiate the indictment, that it contains several distinct charges,—even of felony. But it is said, “that if it appear before the prisoner has pleaded, or the jury be charged, that he is to be tried for separate offences, it has been the practice of the judges either to quash the indictment, lest the prisoner should be confounded or prejudiced in his defence, or to put the prosecutor to his election on which charge he will proceed: but that these are matters of discretion:” (*Young v. The King*, in error, 3 T. R. 106). With this statement of the rule and practice we are not disposed to differ,

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and the only question is in the application of it to the present case. Now it must be admitted that in cases of high treason which seem most nearly similar to this—different kinds of treason, and different overt acts, may be charged in the same indictment—and that it never has been considered either to vitiate the indictment or to afford any ground for quashing it, or putting the crown to an election; indeed, we know that indictments have been maintained which contained at once the old species of treason enumerated in the 25 Edw. 3, and also those enumerated in the late Act (whilst they were treason): (*Thistlewood's case*, 33 St. Tr. p. 682.) We have in our own experience the constant practice, under the Whiteboy Acts, of several offences (both whilst they were felonies, and since they were mitigated to statutable misdemeanors,) being included in the same indictment, such as appearing by day or by night in arms, to the terror, &c.; maliciously assaulting dwelling-houses, taking arms or other property against the will of the owners, administering unlawful oaths, where, though several offences, they arose out of one transaction, or were parts of one *corpus delicti*; we quite concur in the statement of the prisoner's counsel, that there are several compassings charged in this indictment, and that they are charged as distinct felonies. But the authority to which I am about to refer will show clearly that there is no ground on that account for either quashing the indictment, or making a case of election, in this case. We have looked through, I believe, all the cases on this subject; one of the latest, we think, lays down the rule in such a manner as to commend itself to the judgment, as well from the reasonableness of it, as from the high authority of the two learned judges who decided the case upon great deliberation (Mr. Baron Parke and Mr. Justice Patteson). *Rex v. Blackson and others* (8 C. & P. 43), is the case I refer to. When the objection was made, the court, after some discussion, postponed the trial to consider the objection; then, when the trial was called on again, Baron Parke says, "I have no doubt these counts against the female prisoner are properly joined, and that there is a great difference between this case and those cited by Mr. Phillips. The reason why counts ought not to be joined in an indictment against a prisoner for stealing and also for receiving is because they are in fact totally distinct offences, and a prisoner cannot be found guilty of both. But in cases where two charges are not repugnant they may be properly joined, as in an indictment for forgery, where one count is inserted for the forging, and another for the uttering the forged instrument. In such a case the prisoner might be convicted of both charges, and here also a conviction on both counts might take place, the two facts charged form part of one transaction, and cannot possibly embarrass or confuse the prisoner in making his defence; the prosecutor, therefore, cannot be put to his election, and the trial must go on." Patteson, J., in the same case, says, "With respect to electing, there is a case in which a man was indicted for a rape committed by himself, and also for aiding and assisting another party to commit the like offence, on

both which charges he had been convicted; the judges held the conviction proper, though the prosecutrix had not been put to her election, although it had been urged and refused at the trial" (*Folk's case*, 3 Moody C. C. 354); and Baron Parke, again, in summing up, adverting to the decision, says, "We have not come to this decision without giving the subject due consideration, because what we decide here will form a precedent which will determine the course of similar cases in future." Then to apply the rule laid down in that case to the present: here is no repugnancy in the different offences charged, they constitute but one *corpus delicti*, laid different ways. The overt acts are the very same which are charged in support of all the counts, except the two last. If the prisoner is prepared to meet them as applied to one, he is prepared to meet them as to the rest. Even with respect to the two last counts, they only differ from the others by affording an opportunity of giving in evidence other writings in the same newspaper, calculated to carry into effect the compassings charged in the previous counts, but might be supported by the identical evidence which would support the others. As the offences, therefore, charged in this indictment are in no wise repugnant, nor does there appear to be anything by which the prisoner could be embarrassed or prejudiced in his defence, we cannot see any ground either for quashing the indictment or putting the *Attorney-General* to his election, and the motion must consequently be refused.

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MOORE, J.—I concur in the opinion which has been pronounced by my brother Lefroy, and I am very glad that *Sir Colman O'Loughlen* acted with so much candour and fairness in announcing yesterday evening what the grounds were upon which he intended to rely. He did what I should have expected from him, and he adopted a course which is very conducive to convenience. Now it has been conceded by *Sir Colman O'Loughlen* (who, I must do him the justice to say, on every occasion states everything with the utmost fairness,) that even if there were two distinct felonies, that would not form a ground for arrest of judgment, or for a writ of error. I fully concur with *Sir Colman O'Loughlen* in thinking that there may be many cases where a court should quash an indictment where the counts charge the prisoner with distinct offences, as, suppose if a party was charged with a burglary in entering a house in Merrion-square, and with entering a house in Fitzwilliam-square, in such a case it would be extremely unfair to involve him at the same time in two cases, requiring distinct defences, and if this case were at all like the one I have put, I would say it would be unfair here; but it is because I have brought my mind to the conclusion that the cases are not similar, that I have come to the determination that this application cannot be granted. As my brother Lefroy has observed, all the overt acts which go to support the one or the other felony charged in the indictment are the same, and form one *corpus delicti*. I cannot look on it as charging separate distinct felonies, but as attributing a different nature to the same felony. *Sir Colman*

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O'Loghlen has referred to the observations of Lord Chief Justice Tindal, in the case of *O'Connell v. The Queen*, but I will refer him to an antecedent passage (11 Cl. & Fin. 240—1; and 1 Cox Cr. C. 475,) in which Chief Justice Tindal says, "In an indictment for cutting and wounding under the stat. 1 Vict. c. 85, the indictment ordinarily contains two counts at the least; one stating the intent to have been to disable, another to do grievous bodily harm, but the only object of the prosecutor in making this double statement is, that as the charge may take a different complexion and character from the evidence at the trial, the chance of the offender's escape by the misdescription may be avoided. In no case, however, was it ever known in practice that the two counts of the indictment contained two distinct charges of felonious cuttings and woundings, but one *corpus delicti*, under two different descriptions." Now what is the difference of that case and the one before the court? The prisoner is charged with having put forward publications with one intent, that is, one felony; he is again charged with putting forward the same publications with another intent; but it is one and the same act. The prisoner is charged in one count with an intent to depose the Queen, and in another to levy war. So in indictments upon the statute relative to the administering of unlawful oaths (Archbold Cr. L. 536, edit. of 1846), where the purport or intent of the oath is doubtful, the practice is to set it out in different ways in several counts, though every separate intent is a separate felony, and so in cases of cutting and stabbing (where it relates to the same transaction). I am at a loss, therefore, to understand, where the overt acts are the same and the publications are the same, why you cannot charge two intents in the same indictment.

Motion refused.

The prisoner having been again called on to plead,
Right to demur. *Sir Colman O'Loghlen.*—We now propose to demur to this indictment and plead over to the felony; we do not seek to argue the demurrer, but that it should be put upon the record. The demurrer we take is to the way in which the time is stated in the indictment; every day or time is stated under a *videlicet*, and we say that in an indictment a day certain ought to be stated. We demur generally *ore tenus*.

The *Attorney-General*.—I require to see the demurrer.

The demurrer was then drawn up on paper and given to the counsel for the crown.

The prisoner's right to demur and plead over at the same time, was objected to on behalf of the crown.

Sir Colman O'Loghlen.—In *Reg. v. Adams* (Car. & Marsh. 299), it was done; but in *Reg. v. Phelps* (Car. & Marsh. 180), the prisoners were allowed to demur, and afterwards to plead over. *Reg. v. Purchase* (Car. & Marsh. 617), was the case of an indictment for embezzlement. The prisoner having pleaded before his counsel had seen the indictment, and the prisoner's counsel having

stated that some doubt existed whether the prisoner could, if a demurrer was decided against him, plead over to the felony, Mr. Justice Patteson said, "I think that there is no doubt that the prisoner may plead over to the felony, if the demurrer be decided against him." I know that there has been a doubt raised in some text books as to whether it can be done where the case is not capital. But there is no distinction between capital felonies and felonies not capital: (*Gray v. The Queen*, 11 Cl. & Fin. 427.)

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Henn, Q. C., contra.—We do not concede that the prisoner has a right to demur and plead over at the same time; the demurrer must first be decided; there are later cases than those which have been cited which are the other way; allowing such a course would operate as a repeal of the 7 Geo. 4, c. 64. I need not enumerate the different defects which are cured by pleading over, but it has been decided that this objection will no longer be available in arrest of judgment or on writ of error. We are entitled, if the prisoner demur, to have final judgment on the demurrer: (*Arch. Cr. L.*: 85, 6th edit.) In 2 Hawk. ch. 31, it is said that in *favorem vitæ* it may be done.

Sir Colman O'Loughlen.—We only seek what was done in *Reg. v. Purchase*.

MOORE, J.—Have the court discretion to allow the prisoner to plead over after a judgment against him on demurrer?

Sir Colman O'Loughlen.—I submit they have; in two cases the party demurred and pleaded over at the same time: (*Reg. v. Adams* and *Reg. v. Purchase*.) And in one case they demurred, and after judgment on the demurrer pleaded over: (*Reg. v. Phelps*.)

The *Attorney-General.*—I submit that the court is not to pre-judge the case by giving any permission. I deny that the right exists *ex debito justitiæ* to demur and plead not guilty at the same time.

MOORE, J.—It was done in two cases.

Sir Colman O'Loughlen.—In *Rex v. Vaudercom* (2 Leach, 822; 2 E. P. C. 519); *Rex v. Welch* (M. C. C. 175); and *Reg. v. Hedcock* (4 Ch. Cr. L. 5306), there was a plea of *autrefois acquit* and not guilty at the same time.

The *Attorney-General.*—In the case of *Reg. v. Odgers* (2 Mood. & Robinson, 480), Cresswell, J., says, "It is admitted that the only mode of the prisoner's taking advantage of the objection would be by demurrer. And it is said that in felonies he might demur and plead over at the same time. I am decidedly of opinion that the prisoner has *no such right*, and Mr. Justice Patteson and myself, after consultation on the Oxford Circuit, agreed that it ought not to be allowed. If a prisoner demurs he must abide the consequences." This is the latest case on the subject. Patteson, J., is the judge who is said to have decided the case of *Rex v. Phelps*, but Cresswell, J., in *Reg. v. Odgers*, says that he had consulted Mr. Justice Patteson on the subject; therefore, the case of *Rex v. Phelps* cannot now be relied on.

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MOORE, J.—I apprehend it is very plain that a demurrer to an indictment admits all the facts, and if the demurrer is overruled, there is no fact to be tried.

Sir Colman O'Loghlen.—It is clearly stated in the books that a party may plead after demurrer in a capital case.

Henn, Q. C.—It is not so clear even in a capital case, for there is a case in one of the year books (14 Edw. 4, 7 a. pl. 10), in which it is said by Choke, J., that if a defendant demur to a plea and it be ruled against him, he shall be hanged "*quod fuit concessum*."

LEFROY, B.—(To the *Attorney-General*.)—Do you object to the prisoner demurring and pleading not guilty at the same time?

The *Attorney-General*.—I do object, and I take this opportunity of stating that if they demur—without anticipating what the judgment of the court may be—I shall ask the court for final judgment on that demurrer.

LEFROY, B.—We should feel great difficulty in acting upon the case which has been referred to by the prisoner's counsel (*Reg. v. Purchase*, Car. & Marsh. 619), it is so much at variance with the report of what was decided on that occasion as given in a subsequent case: (*Reg. v. Odgers*, 2 Mood. & Rob. 480.) It seems also to be at variance with the law as stated by Lord Coke (2 Institutes, 178), Hale (2nd vol., 257), and Hawk. (book 2, ch. 31, sects. 6 & 7), which latter authority is cited by Laurence, J., in *R. v. Gibson* (8 East, 112), as an authority, that the judgment upon a demurrer to an indictment in criminal cases, not capital, is not "*a respondeat ouster*," but final. Without, therefore, more than thus intimating our present impression, we shall leave the prisoner to take whatever course he may be advised.

The prisoner being so advised by his counsel, pleaded not guilty, and the following day was fixed by the court for his trial.

Thursday, May 25.

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The jurors upon the panel having been called, and more than a full jury having answered to their names, on behalf of the prisoner, the following challenge was tendered to the array of the panel:—

"Court of Oyer and Terminer and General Gaol Delivery in and for the City of Dublin.

"And now, that is to say, the 25th day of May, in the said 11th year of the reign of our Sovereign Lady Queen Victoria, comes the said John Mitchel in his own proper person, and the jurors of the jury empannelled and so forth also come, and thereupon the said John Mitchel challenges the array of the said panel, because he says that the said panel was made, and arrayed, and returned by Henry Sneyd French, Esquire, the High Sheriff of the county of the city of Dublin, or by the person or persons employed by

him to array said panel, at the nomination, instance, and request of some person or persons to the said John Mitchel unknown, acting for and on behalf of the crown in this prosecution; and also because the said panel was arrayed by the said Henry Sneyd French, sheriff as aforesaid, or the person or persons employed by him to array the same, in a partial and favorable manner to our said Lady the Queen, and to the prejudice of him the said John Mitchel, and also because the said panel was not arrayed by the said Henry Sneyd French, sheriff as aforesaid, fairly and impartially from the jurors' book of the county of the city of Dublin for the current year, but on the contrary thereof was knowingly and advisedly by the said Henry Sneyd French, or the person or persons employed by him to array said panel, arrayed from said jurors' book unfairly and prejudicially to the said John Mitchel, so as to deprive him, the said John Mitchel, of a fair and impartial trial, and to have him, the said John Mitchel, tried by persons prejudiced against him: and also because the said Henry Sneyd French, sheriff as aforesaid, or the person or persons whom he employed to array said panel, did, in arraying said panel, omit the names of certain persons (which said names the said John Mitchel is unable to set forth, the same being of record in the office of the clerk of the crown of the county of the city of Dublin, and the said John Mitchel being refused access thereto,) qualified to act as jurors upon the trial of the issue in this cause, who had been heretofore usually summoned as jurors in this honorable court, because he, the said Henry Sneyd French, or the person or persons employed by him to array said panel, deemed them more likely to acquit than to convict the said John Mitchel, and did insert in said panel the names of certain other persons, to wit, the jurors named in the said panel, because he, the said Henry Sneyd French, or the person or persons employed by him as aforesaid, deemed them more likely to convict than to acquit the said John Mitchel: and also because the said Henry Sneyd French, sheriff as aforesaid, or the person or persons whom he employed to array said panel, did, in arraying the said panel, omit the names of certain jurors, because he, the said Henry Sneyd French, or the person or persons employed by him as aforesaid, deemed them more likely to acquit than to convict the said John Mitchel, and inserted therein the names of certain other jurors, because he, the said Henry Sneyd French, or the person or persons employed by him as aforesaid, deemed them more likely to convict than to acquit the said John Mitchel: and also because the said Henry Sneyd French, sheriff as aforesaid, or the person or persons whom he employed to array the said panel, did, in arraying the said panel, dispose the names of certain persons whom the said Henry Sneyd French, or the person or persons employed by him as aforesaid, deemed more likely to convict than to acquit the said John Mitchel, above the names of certain other persons whom he, the said Henry Sneyd French, or the person or persons employed by him as aforesaid, deemed more likely to acquit than to convict the said John Mitchel, to the manifest wrong and injury of him the said

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"ROBERT HOLMES.

"COLMAN M. O'LOGHLEN.

"JOHN E. PIGOT.

"JOHN O'HAGAN."

The *Attorney-General*, after deliberation for some time with the other counsel for the crown, stated that he took issue upon the challenge and called upon the court to appoint triers.

Holmes.—I have now to repeat the application which was made yesterday in the absence of the *Attorney-General* [the application had been originally made on the 24th inst., but notice of the motion having been only given to the crown solicitor at half-past one o'clock on that day, the *Attorney-General* was not in attendance; under these circumstances, and *John Perrin*, on behalf of the crown, objecting to a postponement, and the trial having been fixed for the 25th inst., the court refused to entertain the motion, in the *Attorney-General's* absence], that the trial be postponed in consequence of the absence of a material witness for the prisoner in support of this challenge to the array. The motion is founded on the affidavits of Mr. O'Flaherty, the prisoner's attorney, and Mr. Singleton, his clerk. The former states "that from the result of inquiries which this deponent has made and information communicated to him, which he believes to be true, deponent is advised, and believes, that sufficient grounds exist for challenging the array to the panel in this case; and deponent saith that he is advised by counsel that the array in this case should be challenged, upon the ground of the panel being partially arrayed, to the prejudice of the said John Mitchel. Saith that, to maintain said challenge it will be necessary to produce several witnesses. Saith that immediately after the trial was fixed on yesterday, deponent caused subpoenas to be issued against several persons, and amongst others against Stephen Monahan, Esq., who is clerk to the *Attorney-General*, as this deponent has been informed and believes. Saith he believes the said Stephen Monahan to be a most indispensable witness to sustain such challenge. Saith that he, this deponent, immediately after the issuing of said subpoenas, directed a person of the name of James Singleton to proceed and serve Stephen Monahan, as will more fully appear by the affidavit of said Singleton. Saith that he has heard and believes that the said Stephen Monahan has been acting in the capacity of clerk to the said *Attorney-General* for some months past, and that he (this deponent) believes he is still in the same position, and that his departure from town has been most unexpected. Saith that he, this deponent, has strong ground for producing the said Stephen Monahan as such witness, and that this application is not made for the purpose of delay or for the purpose in any way of vexatiously embarrassing the crown, but for the *bonâ fide* purpose of having the said Stephen Monahan examined, and sustaining the said challenge." The affidavit of Mr. Singleton states that "on the 23rd day of May instant, he, this

deponent, was directed by Mr. O'Flaherty, the attorney for the traverser in this cause, to serve a crown summons on Stephen Monahan, Esq., requiring his attendance at the present commission as a witness for and on behalf of the said traverser. Saith that immediately on receiving such directions he proceeded at once to the commission court in Green-street for the purpose of ascertaining the day fixed for the trial of the said traverser in order to fill up the crown summonses, and on inquiry, having ascertained that the said Stephen Monahan resided at No. 71, Marlborough-street, in the said city of Dublin, deponent shortly after, and on the same day, proceeded to said house, and having made inquiry for the said Stephen Monahan deponent was informed by the maid-servant belonging to said house that the said Stephen Monahan resided there, but had left town the day previous, and on deponent inquiring to what part of the country he went or when it was likely he would return, the said servant informed deponent she did not know. Saith that suspecting that the said Stephen Monahan was keeping out of the way lest he might be served with said summons, made several inquiries at different places to ascertain if such was the fact, but could gain no intelligence of him; in consequence of which this deponent again applied this morning at the said residence of the said Stephen Monahan, when he was informed by the man-servant belonging to said house that the said Stephen Monahan had left town by the eleven o'clock train on Monday morning, for the purpose of proceeding to the fair of Loughrea, in the county of Galway, but would return in a couple of days." It should be the desire of the crown that the panel should be not only perfectly chaste but above suspicion. If the crown produce this gentleman, we are ready to proceed at once.

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The Attorney-General.—They want the crown to do a thing which is impossible. If they had taken any pains they might have secured the attendance of the gentleman by serving him with a summons.

Holmes.—How could we summon the witness until a day was fixed for the trial? It is necessary to state in the summons the day the trial is to take place. The moment we ascertained the day the court had fixed, we at once proceeded to serve this gentleman. We have heard that he is in the county of Galway, and that he is expected back in a few days. He is the clerk of the *Attorney-General*; the *Attorney-General* must be better informed on the subject than we can possibly be. I submit, therefore, that this application ought to be granted. There is also another witness absent, Mr. Wheeler, a person generally employed by the sheriff. We have searched for him, and are informed that he is gone away and is not forthcoming.(a) Having only learned the fact to-day, we have not had time to make any affidavit of it; but witnesses can be produced to show the fact.

(a) It afterwards appeared, upon the evidence of the sub-sheriff, who was examined in support of the challenge, that Mr. Wheeler had left Dublin to attend a committee of the House of Commons, in pursuance of the Speaker's warrant.

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LEFROY, B.—If you have no affidavit of the fact, we can't go into an investigation of it upon a *vivâ voce* examination of witnesses.

The *Attorney-General*.—Nothing would induce me to resist this application if I were not perfectly satisfied that it is made on the allegation of the absence of a person as a witness who could not be examined as a witness for the prisoner, and who, in fact, knows nothing whatever of the subject of the challenge. The affidavit in support of this application is insufficient. It is new doctrine to me that you cannot summon a witness until a day is fixed for the trial. Notice of this motion was only served yesterday at one o'clock. Mr. Singleton has made an affidavit, in which he states that he suspected that Stephen Monahan was keeping out of the way to avoid service of a summons. But an affidavit has been made by Dr. Monahan, brother of Mr. Stephen Monahan, and in whose house he lives, stating that he was aware that for several days previous Mr. Stephen Monahan intended to leave town on Monday last, for the purpose of transacting business of a private nature, and not for the purpose of avoiding being examined as a witness in this case. The deponent adds that the nature of his brother's visit to the country has reference to some lands which have, within the last fortnight, come into the possession of James Henry Monahan, and that he went for the purpose of purchasing stock for said lands at the fair of Loughrea to-morrow (Friday). It is most unwarrantable to charge a gentleman with leaving town for the purpose of avoiding the service of a summons, when if the commonest diligence had been used his attendance might have been secured. If upon the evening of the day on which Mr. Monahan left town notice had been served on the crown solicitor stating that his presence was necessary, it would have been possible, by sending a special messenger after him, to have him in court to-day, but they don't give any intimation that his presence will be required until one o'clock yesterday, when, by no possibility could this gentleman be sent for and brought back in time. But, besides, the affidavit of the prisoner's attorney in support of this motion is defective, for there is no fact stated in it which Mr. Stephen Monahan could depose to—no material fact is mentioned of which he could give evidence. It is merely stated that Mr. O'Flaherty "is advised and believes that sufficient grounds exist for challenging the array of the panel in this case," and that "he believes the said Stephen Monahan will be a most indispensable witness to sustain such challenge;"—no grounds are stated for inducing a belief that he is an indispensable witness, or that he can prove any facts of consequence. If the facts are so, there should have been a positive affidavit to that effect.

Holmes.—The allegation that the witness has left town from an improper purpose is now negatived, therefore that charge must be withdrawn; but the materiality of the witness's evidence is not affected by that, nor the prisoner's right to have the benefit of his testimony.

The *Attorney-General*.—There is no statement whatever that

Mr. Monahan is, in point of fact, a material witness, nor can I see any reason for requiring his presence, except for the purpose of delay, and therefore, my lords, I feel warranted in opposing this application.

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LEFROY, B.—The application made to us in this case is to postpone the trial of the issue now joined on a challenge to the array, on the ground of the absence of a material witness. It is always required that a statement be made by affidavit of the materiality of the witness; but that is not the only ground. Lord Mansfield says, upon a similar application (*The King v. D'Eon*, 1 Wm. Blackst. Rep. 514), "No crime is so great, no proceedings so instantaneous, but that upon sufficient grounds the trial may be put off. If the usual form of the affidavit is observed, and there is no *special* ground of suspicion, the rule goes of course. But if there be such grounds, it is refused, unless the party will go into further and minuter circumstances; or if it appear there is an affected delay, the rule is also then refused. Three things are necessary to put off a trial; first, that the witness is really material, and appears to the court so to be; second, that the party has been guilty of no neglect; third, that the witness can be had at the time to which the trial is postponed." These rules, we know by every day's experience, are required to be observed even in capital cases. The court must be satisfied that due diligence has been used to procure the attendance of the witness; that due diligence consists in issuing and serving a summons in reasonable time to enable the witness to attend at the trial. I know no rule of law that the prisoner is not to make preparation for his defence until the very day is fixed for his trial. Neither I or my brother Moore know any rule which establishes that proposition. No doubt, if, even on the very day fixed for his trial, he satisfied the court that he was ignorant that he (the witness) could give material evidence, up to the time of making the application, it might be even then the duty of the court to postpone the trial. But such being the rule of law, and a reasonable rule of practice, the duty of preventing that rule from being abused for the purpose of delay, or obstructing the administration of justice, is imposed on the court. Now what are the facts in this case? The prisoner was committed on the 13th day of May, when he was put into possession of the grounds of his committal. Bills of indictment were sent up to the grand jury on the first day of the sessions (20th May), and their attention was called to them by a charge from the bench. The whole case was then developed; the prisoner and his advisers were then at least, apprised of the case he would have to meet, and on Monday the bills were found. On that day various preliminary matters were discussed, which left no doubt that a challenge to the array was then in contemplation. On Tuesday, the *Attorney-General* called on the court to fix the trial for Wednesday, and we were about to fix it, when there was an application on the part of the prisoner to postpone the trial on the ground of his counsel not being able to attend on that day. The *Attorney-General* having objected to the delay on the ground

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of the uncertainty as to what preliminary proceedings were intended to be taken on the part of the prisoner, it was then distinctly avowed that a challenge to the array was to be taken; but on a statement by the prisoner's counsel that in his opinion the trial would not last more than one day, including the challenge to the array, the *Attorney-General* consented to the trial being postponed till Thursday. To-day an application is made to violate that arrangement, and to postpone the trial in consequence of the alleged absence of a material witness to support a challenge to the array. When was this discovery made of the materiality of this witness? The affidavit is perfectly silent as to that most important matter. Have we it verified by the affidavit, that the party used any diligence whatever to serve a summons on the witness, or take any step whatever to procure his attendance, until after he had left town? Is there any ground to satisfy the court that whatever materiality there might be in the testimony of this witness was unknown to the prisoner or his advisers, whilst the witness was in town? Or, on the contrary, do not all the circumstances of the case lead strongly to an opposite inference? Upon the whole of this case, therefore, and adverting to the rule of law and practice so necessary to be sustained for the ends of justice, we feel ourselves bound to refuse this application.

MOORE, J.—After what has been said upon the subject by my brother Lefroy, it is unnecessary for me to say more than that I concur in the rule which has been pronounced for the *first* ground which has been stated, and on that ground only.

Motion refused.

The COURT proposed to appoint as triers the foreman of the county of Dublin grand jury and the grand juror next him on the list, which nomination not having been objected to by the *Attorney-General* or the counsel for the prisoner, Thomas James Quinton, Esq., the foreman, and William Worthington, Esq., the next to him on the list of the county grand jury, were accordingly sworn "well and truly to try the challenge to the array in this case, and a true verdict give according to the evidence."

Peter Slevin, a witness, called in support of the challenge, having stated that he had looked through the panel, was then asked by *Sir Colman O'Loghlen* the following question:—Are you able from your information to state how many Roman Catholics there are on the panel?

The *Attorney-General*.—I object to that question.

LEFROY, B.—You know that is a perfectly irrelevant question.

Sir Colman O'Loghlen.—We press the question; we say that on this panel there are only twenty-eight Roman Catholics out of one hundred and fifty jurors on the panel; we also say that there are on the jurors' book two-thirds Roman Catholics to one-third Protestants; there are on this panel only about one-sixth Catholics to five-sixths Protestants. In the case of *Adams and Langton* (Report of Maryborough Special Commission, p. 239), which was tried by Bushe, C. J., and Sir W. Smith, B., there is a passage

in the charge of the Lord Chief Justice to the triers upon a challenge to the array, which applies strongly to our objection in the present case. He says, "Your duty is to try whether this is an impartial panel, or has it been so constructed as to deprive the prisoner of a fair trial? If persons have been left off the panel, or corruptly placed or postponed in such a manner and to such an extent as would deprive the prisoners of impartial jurors, or throw them into the power of jurors prejudiced against them, this is not an impartial panel, and you will find accordingly." Now, my lords, I say that applies perfectly to our case; we are prepared to prove that whilst the proportion of persons qualified to be jurors is two-thirds Catholics and one-third Protestants, the proportion here upon the panel is five-sixths Protestants and one-sixth Catholics. From this fact we assert, that the sheriff has not made out an impartial panel. If he had, it would be different from what it is. If made out according to the proportion of Catholics and Protestants, there would be upon it two-thirds Catholics and one-third Protestants. But putting the question of religion altogether out of the question, if the names are classified alphabetically, if a small proportionate number of those names begin with the letter L., and a very large number are classed under the letter M., and that it was found that on the panel, out of the names taken from the two letters, two-thirds were taken from the less numerous letter L., and but one-third from the more numerous letter M., I ask, would not that look suspicious? But if the disproportion is shown to be a great deal more unequal even than that, is it not natural to draw the inference that fair means have not been used? We now offer this evidence to show that in this instance there is reason to believe that unfair means have been used in the formation of the panel.

Henn.—The case to which *Sir Colman O'Loughlen* has referred is substantially an authority against his objection to this array.

LEFROY, B.—I should like to know what the requisite proportion is to make an impartial panel?

Henn.—The question here is whether the array has been made in a corrupt manner and from a partial motive. The challenge to the array in *Rex v. Adams and Langton* has formed a precedent for the greater portion of the challenge which has been put in here to-day. In charging the triers in that case, *Bushe, C. J.*, says, "That very plain question (whether the panel was impartially arrayed) has led to the discussion of another, its connexion with which I am unable to discover, that is, whether the Roman Catholic freeholders of the Queen's County have been returned in such numbers and in such places as their fair pretensions, on the score of rank and respectability, entitle them to." "We have nothing to do with the question whether that complaint is well founded, or whether the evidence you have heard has not afforded a sufficient answer and explanation, but we must confine our attention to the single question whether this is an impartial panel." "I might say that it has not appeared to this

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moment of what religion the prisoners are. And it would be affectation not to assume that they are Roman Catholics, and we know from the crown books that they are charged with an offence connected with the existing insurrection; but when I look at the words of the challenge I cannot imagine to myself how the evidence we have heard, supposing all the inferences claimed from it to be well founded, can apply to the question before us, unless we are bound to identify the insurrection, and the crimes it has produced, with the religion of the prisoners,—an insult and calumny directed against my Roman Catholic fellow-subjects in which I cannot consent to participate.” These observations apply with greater force here. It does not appear what the religion of the prisoner is. And I say with that learned judge that it would be an insult to the Roman Catholics entitled to serve on juries, to say, that they would find a verdict on account of their religion.

Holmes.—We don’t put it on the ground of religion. If a man were playing hazard, if all is fair, and the dice are not loaded, there can be no honester game; but if one man always throws “crabs,” as it is called, whilst the other always throws in his own favour, the presumption is that the dice are loaded; so, in this case, there is strong evidence that all is not right. If the natural result of the proportionate number of those qualified to be placed on the panel should be that there would be on it two Catholics to one Protestant, and that we find so far from that being the case there are of Protestants five to one on the panel, is it not the natural presumption that there has not been fair dealing in the construction of the panel?

LEFROY, B.—Suppose there were a great many rich men on the panel, and a poor man was to be tried, or that there were a great many very poor men on the panel, and a rich man was to be tried, would it be an impartial panel?

Holmes.—I would say not.

LEFROY, B.—That case has been already decided the other way by Lord Tenterden, who has pronounced an opinion that it is not an objection.

MOORE, J.—The judgment to which I have come, from what I have heard, is that this evidence ought to be received. The objection made to its admissibility is that it is irrelevant. It does not appear to my mind that the evidence is so plainly, and palpably, and clearly irrelevant, as that it could not in any case be left to the triers, with other evidence. Let me put this case. Suppose that the sheriff was proved to have been making inquiries about persons as to their religion, and after those inquiries, left them on, or took them off the panel, would not the evidence in such case be applicable? And though possibly and probably the evidence may ultimately turn out not to be relevant, or of any value, I think it safer in the first instance to admit it.

The Attorney-General.—In the case at the Maryborough Special Commission, the admission of the evidence referred to in Chief

Justice Bushe's charge was not objected to. I contend that the sheriff is not bound to put his hand into a balloting box and take out the names of jurors by chance: if he selects the names honestly and fairly from the jurors' book, that is all that can be required of him.

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Sir Colman O'Loughlen.—But that is just the question to be tried upon this challenge.

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LEFROY, B.—It is much safer, in accordance with the opinion of my brother Moore, to admit the evidence at present, and then, if it be clearly irrelevant, to exclude it when we come to charge the triers.

The examination of the witness was then proceeded with. He stated that he had examined the panel, and that there were twenty-four or twenty-five Roman Catholics upon it.

The witness was then asked, did he assist in examining the names on the jurors' book?

The *Attorney-General* objected to any evidence being given of the contents of the jurors' book, the book not being produced.

A document purporting to be a copy of the general lists of jurors, prepared pursuant to the stat. 3 & 4 Will. 4, c. 91, and of which, when revised by the recorder in open court, and signed by him, the jurors' book is composed, was put into the witness's hands for the purpose of enabling him to state from it the relative number and disposition of the names of Protestants and Catholics on the jurors' book and the panel. This was objected to on behalf of the crown.

Holmes.—It is to be presumed that, when this document purports to be printed for a public purpose, it is a correct copy.

MOORE, J.—How could the witness state that it is a copy of the jurors' book?

LEFROY, B.—It is quite an elementary rule of law that where the original is in existence, a copy is not evidence.

Sir Colman O'Loughlen.—The jurors' book is in the clerk of the peace's office, within the precincts of the court, and would be produced by the officer, if the court ordered.

This the court declined to do, and the witness was withdrawn.

Francis Dowling proved that he had attended at the revision of the jury lists for the present year before the recorder, and took a list of the jurors placed on the revised list by the recorder in open court. In answer to the *Attorney-General*, he stated, that he did not compare the copy of the lists now produced with the list as revised by the recorder, after it had been made up and signed by the recorder.

Sir Colman O'Loughlen.—We now propose to prove that this list which we offer in evidence is a copy of the jurors' list revised in open court by the recorder, and of which, when so revised, the jurors' book is composed.

The *Attorney-General* objected to the document being received in evidence.

LEFROY, B.—The thing from which the sheriff is to take his

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panel is the jurors' book, and nothing can be evidence of the contents of the book except the book itself, unless the Act of Parliament dispenses with its production, and makes something else evidence of it.

Holmes.—The clerk of the peace has refused to produce the jurors' book without an order from the court; but, even if it were produced, the witness would take a considerable time to make an analysis of it similar to that which he made of the book which has been already produced, and which copy the prisoner has been forced to make use of, as he had not access to the original book.

The *Attorney-General*.—It was quite competent to the prisoner's agent to have gone into the office of the clerk of the peace, and to compare the panel with the jurors' book. They want now to have a postponement of the trial, perhaps till the day after to-morrow, to investigate the names on the book, when they could have got this information which they now seek in time, if they had applied in the proper quarter.

LEFROY, B.—We are clearly of opinion that the document offered in evidence can by no means be received as evidence of the contents of the jurors' book. Then we are asked to postpone the trial, and to give an order for the production of the jurors' book, in order to give an opportunity of investigating the religion of the several jurors, and making an analysis to show the proportion of jurors of different religious persuasions on the book, and comparing that with the proportion in which they appear on the panel. But unless the law has ascertained what that proportion should be, and that the court can thus have some standard in reference to which to direct the triers, it would be a nugatory and irrelevant inquiry, as well as invidious and objectionable, for the reasons so well expressed by the late Chief Justice Bushe, in the case referred to. (a) We must, therefore, refuse this application.

John Bruton, a person whose name did not appear on the panel, having been called as a witness in support of the challenge, stated that he had, notwithstanding, received a summons to attend as a juror. The witness was now asked by *Sir Colman O'Loghlen* the following question: What is your religion?

The *Attorney-General* objected to the question.

LEFROY, B.—I don't see any reason at present for admitting this evidence.

Sir Colman O'Loghlen.—I submit that it is evidence to show partiality on the part of the sheriff, that before the arrest of Mr. Mitchel, Bruton had been summoned to attend this court as a juror, but afterwards his name was not placed on the panel.

LEFROY, B.—First prove the service of the summons on the witness.

Service of the summons on the witness (who stated that he was not personally served with it,) not having been satisfactorily proved, he was withdrawn.

(a) See Mongan's Report of the Maryborough Special Commission in 1832, p. 236.

John Rosborough, a person who was proved to have been served with a summons to attend as a juror, but whose name was not on the panel, was asked what his religion was,

LEFROY, B.—It is quite irrelevant.

The question was disallowed. And also in the case of E. J. Milliken, who was examined for the purpose of showing that though he had been only summoned on the previous Friday evening, yet he had been placed on the panel, the same question was put and disallowed by the court.

H. S. French, Esq., the high sheriff of the city of Dublin, and Mr. Hamilton, his returning officer, were examined in support of the challenge by the prisoner's counsel, and cross-examined by the counsel for the crown. They stated that they had prepared the panel, but distinctly negatived the charges of partiality and corruption in the formation of it, or that they had received any suggestion on the subject from any one connected with the prosecution, or that they selected out of the jurors' book the names upon it from a knowledge of the religion or politics of the parties. The clerk of the crown and the sub-sheriff having also been examined, and the evidence in support of the challenge having closed without the testimony of the sheriff or his returning officer being in any way contradicted,

The *Attorney-General* submitted that the allegations contained in the challenge had been refuted by the evidence adduced in support of it, and that there was no evidence to go to the triers to sustain the challenge, and therefore declined making any further observation upon the issue to be tried.

Thomas J. Quinton, Esq., one of the triers, having, by desire of the court, read out the issue sent to them, which was to try and inquire whether the array of the panel was well, equally, and impartially made by the said sheriff and his officers, according to the duty of his office or not,

LEFROY, B., (addressing the triers).—That, gentlemen, is the question which you have to try. Every person who could by possibility give you information upon that question, involving, as it does, one of the most important duties of the sheriff, and his due performance of it, has been produced, every opportunity of satisfying your minds has been afforded; you have heard the examination of those witnesses who, if there had been any corrupt motive or practice in the conduct of the high sheriff in forming that panel, must, from their position, have been acquainted with it; you have heard the persons who made out the panel (the sheriff and his returning officer) state on their oaths that they had made that panel impartially, and that they had no communication, direction, or understanding from or with any person so as to influence their judgment, and that they had no partial or corrupt view in selecting the names upon it; that they only selected them with a view to the respectability and character of the parties selected. They have been closely sifted upon the subject; if you find any grounds upon which you can on your oaths impute to the sheriff or his officers anything which brings him or them within

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the charge of partiality, or what is called unindifferency in the framing of the panel, you will find for the challenge; but, on the other hand, if you find no such grounds, you will find against it, and, in our opinion, and you have a right to know that opinion, there is no evidence whatever to sustain the charge of partiality or unindifferency in the formation of the panel by the sheriff or his officers, and you will be warranted in finding against the challenge.

The Triers found against the challenge.

The panel was then called over, and after twenty peremptory challenges on behalf of the prisoner, and thirty-nine jurors being set aside on behalf of the crown, a jury was sworn, and it being then five o'clock, the trial was adjourned on the motion of the *Attorney-General*, until the following morning, the prisoner's counsel not objecting. (a)

Friday, May 26.

The jurors having been called over, and having answered to their names, the trial was proceeded with. (b)

Pierce George Barron, Esq., a resident magistrate, a witness produced on behalf of the crown, stated that he was at an entertainment given in Limerick, and saw Mr. Mitchel there.

Holmes objected that the evidence was irrelevant.

MOORE, J.—It may be, or it may not.

Evidence.

The evidence was received. The witness was asked, Did you hear him speak?

The question was objected to, but the objection was overruled.

The witness having stated that he heard the prisoner speak on the occasion referred to, was then asked, Did you hear him speak a speech to the purport of the report which you have heard read (the speech at Limerick published in *The United Irishman* of the 6th May, 1848)?

Overt act.

LEFROY, B.—Really you have laid no overt act for the *speaking* of this speech. The evidence of speaking under this statute is to be treated with peculiar strictness. His *speaking* this speech has neither been laid as an overt act, nor charged in the indictment. If the evidence be offered with a view to identify Mr. Mitchel as the person who is reported to have spoken that speech, so far it may be offered, but not further. That is our opinion.

The prisoner's counsel admitted that the Mr. Mitchel mentioned in the report of the speech was the prisoner.

(a) The jury were brought to a neighbouring hotel in the charge of sworn bailiffs, and were there provided with beds and refreshments, and were brought back to court in like manner on the following morning.

(b) The evidence offered to sustain the indictment in this case was statutable evidence; under the provisions of 6 & 7 Will. 4, c. 76, of the prisoner being sole proprietor of the newspaper called *The United Irishman*; proof of the publication of those numbers of *The United Irishman*, containing the articles specified in the indictment, by proof of lodgment in Stamp Office of copies, signed by the prisoner, of those numbers of the paper, and proof of the purchase of copies at the office of the paper, and that those places were within the venue laid in the indictment. Evidence was also offered to show that the prisoner spoke a speech at Limerick to the purport of the printed speech, the publication of which was charged in the indictment as one of the overt acts, but the court refused to admit the evidence, except so far as it showed the person meant in the printed speech to be the prisoner, which, however, was admitted by his counsel, and what the precise object was in offering the evidence did not clearly appear. No evidence was offered for the defence.

The case for the prosecution having closed,

Holmes, for the prisoner, objected that it was not laid in the indictment what the specific counsels or measures were which, in the several counts, the prisoner was charged with seeking to compel Her Majesty to change, and that there was no evidence to go to the jury of a design to compel Her Majesty to change, any specific measures or counsels.

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The Court overruled the objection, LEFROY, B., observing that the charge appeared on the record, and the court would, if necessary, at a future stage of the trial, refer to the objection. Accordingly in charging the jury upon this part of the case, the following observations were addressed to them:—

Evidence to
sustain indict-
ment.

MOORE, J.—It will be necessary to occupy some small portion of your time in explaining that part of the indictment which refers to the compassing to levy war, to compel Her Majesty to change her measures and counsels. You have been told that no measures were specified. Gentlemen, it is very true that there is no specification in the indictment of any measures or counsels, but it is my duty, and I have, I believe, in this the concurrence of my brother judge, that in order to constitute this offence it is not necessary in point of law to specify in the indictment any particular measures, or in point of evidence to give proof of any particular measures. We are dealing with an intent—we are to collect what was passing in his (the prisoner's) mind, and we can only collect it, in this case, from his expressions or his printings, but if, because he kept secret in his own mind what measures he intended to compel her to change, though he might be doing what he considered would have a tendency to compel Her Majesty to change certain measures, if the prisoner's counsel be right in point of law, it could never be made the subject of an indictment, as the particular measures contemplated by the prisoner could never be known. In a case which was cited (*Thistlewood's case*, 33 St. Tr. 682,) the law is laid down on the subject by Lord Tenterden, one of the ablest judges, both in his charge to the petty jury and to the grand jury. He never raised the question, nor was it raised by the able counsel on either side. I have the concurrence of my brother judge to tell you that, in point of law, it was not necessary to have laid in the indictment the specific measures—nor was it necessary to give evidence of the specific measures—for the compelling a change, in which he (the prisoner) intended to levy war, if you should be satisfied that it was his intention to levy war to compel her to change them.

The measures
to change
which prisoner
compassed to
levy war, not
necessary to
be laid or
proved.

Verdict, Guilty.

May 27.

The prisoner was brought up to the bar of the court and sentenced to be transported for fourteen years.

The *Attorney-General* then requested that the judgment might be entered on each count, to which the court acceded.

Counsel for the crown:—The *Attorney-General*; *Henn*, Q. C.;

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The Hon. John Plunket, Q. C.; Baldwin, Q. C.; Whiteside, Q. C.; Smyly; and John Perrin.
Counsel for the prisoner:—Robert Holmes; Sir Colman O’Loghlen; J. E. Pigot; and John O’Hagan.
Agent for the crown:—Kemmis (crown solicitor).
Agent for the prisoner:—Martin Francis O’Flaherty.

COURT OF EXCHEQUER.

February 26, 1848.

RYALLS v. REGINAM.(a)

Perjury—Indictment—Summons to tax an attorney’s bill—Lunar or calendar month—Several counts—General verdict and judgment.

In an indictment for perjury alleged to have been committed in an affidavit sworn, before showing cause, in answer to an application by an attorney for taxation of his bill after the expiration of one “month” from its delivery, it is not necessary to negative any application by the party chargeable before the expiration of the month, inasmuch as the judge would have jurisdiction to issue the summons and commence the inquiry whether any such application had been made or not.

The indictment used the word “month:”

Held, that as the stat. 6 & 7 Vict. c. 73, was expressly referred to in the indictment, the same construction must be given to that word in the indictment as in the statute; and that therefore it must be held to mean “calendar month.”

A count of an indictment for perjury concluding thus, “And so the jurors, &c., did say that the said J. N. R., &c., did commit wilful and corrupt perjury,” is not bad, because the whole averment may be rejected as surplusage.

The affidavit denied the retainer:

Held, that the retainer was a material fact to be ascertained, and that therefore perjury might properly be assigned upon the statement denying it.

“Misdemeanor” is nomen collectivum; and therefore where the venire was to try “whether the said J. N. R. be guilty of the perjury and misdemeanor aforesaid or not guilty;” and the verdict was “guilty of the perjury and misdemeanor aforesaid, in manner and form as by the said indictment is supposed against him:”

Held, that there was no uncertainty in either; that both the venire and the verdict applied to all the counts; and that a general judgment of imprisonment “upon the premises,” was good.

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THIS was a writ of error brought upon the following record:—
Yorkshire, to wit.—Be it remembered, that at the special session of gaol delivery and oyer and terminer, holden at York, &c., on Saturday, the 6th day of December, in the ninth year of

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

Queen Victoria, &c., by the oath of, &c., it is presented that one William Unwin, after the passing of a certain Act of Parliament, &c., (6 & 7 Vict. c. 73,) and before and at the time of the committing of the offence hereinafter mentioned, was an attorney practising in England, and was duly admitted and practising as such attorney in Her Majesty's Court of Exchequer at Westminster, and had done and transacted business as such attorney in her said Court of Exchequer, for and on behalf of J. N. Ryalls, late of, &c., and of J. Ironsides, and on the retainer and at the request of the said J. N. Ryalls; and the said J. N. Ryalls, and the said J. Ironsides, then and there became and were indebted in a large sum of money to the said W. Unwin, for fees, charges, and disbursements for the business so done and transacted for the said J. N. Ryalls and the said J. Ironsides, by the said W. Unwin as aforesaid, and the said W. Unwin afterwards and before the committing of the said offence hereinafter mentioned, to wit, on, &c., so being such attorney as aforesaid, did deliver to the said J. N. Ryalls and the said J. Ironsides (they the said J. N. Ryalls and the said J. Ironsides, then and there being the parties to be charged therewith), a bill for the fees, charges, and disbursements for the said business so done and transacted by the said W. Unwin, as such attorney as aforesaid, which said bill was then and there subscribed with the proper handwriting of him the said W. Unwin, so being such attorney as aforesaid; and that no application was made to the said Court of Exchequer, so being the Court in which the said business was so done and transacted as aforesaid, or to any judge thereof, or to any court or judge whatever, by the said J. N. Ryalls and the said J. Ironsides, so being the parties charged by the said bill, or by either of them, within one month after the said delivery of the said bill, nor did the court of Exchequer, &c. within one month, &c. refer the said bill and the demand of the said W. Unwin as such attorney as aforesaid thereupon, to be taxed by the proper or any officer of the said Court of Exchequer, or of any other court. And by the jurors aforesaid, upon their oath aforesaid, it is further presented, that afterwards, and after the expiration of one month after the delivery of the said bill as aforesaid, and before the committing of the said offence hereinafter mentioned, to wit, on, &c., at, &c., the said W. Unwin, so being such attorney as aforesaid (the said bill then and there remaining due, unpaid, and unsatisfied to him the said W. Unwin), did make application to Sir R. M. Rolfe, Knt., then and there being one of the judges of the said Court of Exchequer, in which the said business was so done and transacted by the said W. Unwin as aforesaid in the matter of him the said W. Unwin, to refer the said bill so delivered as aforesaid, and the demand of him the said W. Unwin thereupon, to be taxed and settled by the proper officer of the said Court of Exchequer. And thereupon afterwards, to wit, on, &c., at, &c., the said Sir R. M. Rolfe, so being the judge of the said Court of Exchequer as aforesaid, issued a summons in the matter of the said W. Unwin, requiring the said J. Ironsides and the said J. N. Ryalls, or their

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attorney or agent, to attend the said Sir R. M. Rolfe, at his chambers in Rolls Gardens, on, &c., to show cause why (amongst other things) the said W. Unwin's bill of costs in the causes and matters delivered to the said J. Ironsides and J. N. Ryalls, should not be referred to the master of the said Court of Exchequer to be taxed, (the said bill of costs in the said summons mentioned, then and there being the said bill for the fees, charges, and disbursements for the said business so done and transacted by the said W. Unwin, as such attorney as aforesaid, and so delivered by the said W. Unwin as aforesaid).

And by the jurors aforesaid, upon their oath aforesaid, it is further presented that the said J. N. Ryalls, afterwards and before the time appointed for showing cause, and before showing cause against the said application and the said matters mentioned in the said summons, to wit, on, &c., at, &c., came before H. W., then and there being a commissioner duly authorized and appointed to take and receive affidavits touching and concerning matters depending in the said Court of Exchequer, and touching and concerning the matter of the said W. Unwin, in the said summons mentioned; and it then and there became and was material in showing cause why the said bill of costs, in the said summons mentioned, should not be referred to the said master to be taxed, as in the summons mentioned, to ascertain whether the said J. N. Ryalls did retain or employ, or otherwise authorize the said W. Unwin to act as attorney for him the said J. N. Ryalls and the said J. Ironsides, or for either of them, in or about the business mentioned in the said bill of costs of the said W. Unwin, in the said summons mentioned, or in or about any part of such business, and whether the said J. N. Ryalls had ever retained or employed the said W. Unwin to act as attorney or agent for him the said J. N. Ryalls. And the said J. N. Ryalls so having come and being before the said H. W., so being such commissioner so authorized and appointed as aforesaid, then and there produced a certain affidavit in writing of him the said J. N. Ryalls in the matter of the said W. Unwin, in the said Court of Exchequer, and then and there before the said H. W., in due form of law, was sworn and took his corporal oath upon the Holy Gospel of God concerning the truth of the matters contained in the said affidavit (he the said H. W. then and there having a lawful and competent power and authority to administer the said oath to the said J. N. Ryalls in that behalf); and that the said J. N. Ryalls not having the fear of God before his eyes, but intending to cheat and defraud the said W. Unwin of the said fees, charges, and disbursements, then and there, upon his oath aforesaid, before the said H. W., (he the said H. W. then and there having a lawful and competent power and authority to administer the said oath to the said J. N. Ryalls in that behalf), falsely, corruptly, knowingly, wilfully, and maliciously, in and by his said affidavit in writing in the matter of the said W. Unwin, in the said Court of Exchequer, did depose and swear (amongst other things) in substance and to the

effect following, that is to say, that he the said J. N. Ryalls, referred to in the summons of the Honorable Baron Rolfe in that matter (meaning the summons of the said Sir R. M. Rolfe, Knight, in the said matter of the said W. Unwin above mentioned), did not retain or employ the said W. Unwin (meaning the said W. Unwin) to act as attorney for him (meaning the said J. N. Ryalls), and J. Ironsides (meaning the said J. Ironsides), also mentioned and referred to in the said summons, or for either of them, in and about the business mentioned in the said W. Unwin's bill of costs delivered to him the said J. N. Ryalls and the said J. Ironsides, (meaning the said bill of costs in the said summons mentioned, and the bill so delivered by the said W. Unwin to the said J. N. Ryalls and the said J. Ironsides as aforesaid), or in or about any part of such business; and that he the said J. N. Ryalls never retained or employed the said W. Unwin to act as attorney or agent for him the said J. N. Ryalls, in any cause or matter whatever, as in and by the said affidavit of the said J. N. Ryalls, in the said matter of the said W. Unwin, more fully and at large appears: whereas, in truth and in fact, the said J. N. Ryalls did, to wit, on, &c., at, &c., retain and employ, and authorize the said W. Unwin to act as attorney for him the said J. N. Ryalls and J. Ironsides, in and about the business mentioned in the said W. Unwin's bill of costs, so delivered to the said J. N. Ryalls and the said J. Ironsides as aforesaid, and in and about every part of such business; and whereas, in truth and in fact, the said J. N. Ryalls had, to wit, on, &c., at, &c., retained and employed the said W. Unwin to act as attorney and agent for him the said J. N. Ryalls, in the said business in the said Court of Exchequer as aforesaid. And so the jurors aforesaid, upon their oath aforesaid, did say that the said J. N. Ryalls, on, &c., at, &c., before the said H. W. (he the said H. W. then and there having such lawful and competent power and authority as aforesaid), by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

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The 2nd count differed from the 1st only in stating that the business was done on the retainer of J. N. Ryalls and J. Ironsides.

The 3rd and 4th counts were the same as the 1st and 2nd counts respectively, except that the averment negating any application to the Court of Exchequer by the parties chargeable within a month, was omitted.

The record then proceeded to set forth a *venire* to the defendant to appear and "answer the premises" at the next gaol delivery for the county of York, and his appearance in obedience thereto. It then proceeded: "And being brought to the bar here in his

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proper person, and forthwith being demanded *concerning the premises in the said indictment above specified and charged upon him*, how he will acquit himself thereof, he saith that he is not guilty thereof, and thereof for good and evil he puts himself upon the country." It then stated a joinder by the clerk of the crown; a writ of *venire juratores* to try "whether the said Joseph N. Ryalls be guilty of *the perjury and misdemeanor* aforesaid, or not guilty;" a verdict "that he is guilty of *the perjury and misdemeanor aforesaid* in manner and form as by the said indictment above against him is supposed;" and then the following judgment: "Whereupon *all and singular the premises being seen* and by the court here fully understood, it is considered by the court here that the said J. N. R. be committed to the house of correction at Wakefield, in and for the West Riding of the said county, and there imprisoned and kept to hard labour for ten calendar months."

January 23, 1847.

Pashley for the plaintiff, in error.—This is the case of an indictment for perjury, with several counts, some of which are bad, and a general judgment. First, the 3rd and 4th counts are bad for not negating a previous application by the party chargeable; the absence of which is necessary to give jurisdiction; and therefore must be stated: (Stat. 6 & 7 Vict. c. 73, s. 37; *Christie v. Unwin*, 11 Ad. & E. 373; *Brancher v. Molyneux*, 4 M. & G. 226; *R. v. David Smith*, 1 New Mag. Cas. 484; 15 L. J. M. C. 41.) An indictment for perjury committed in the course of bankruptcy proceedings is bad, if it does not show a good petitioning creditor's debt: (*Rex v. Jones*, 4 B. & Ad. 345.) And in support of an indictment for perjury committed in a bankrupt's last examination strict evidence of bankruptcy must be given: (*Rex v. Punshon*, 3 Camp. 96). *Ewington's case* (2 Moo. C. C. 223; Car. & M. 319), is to the same effect with regard to the jurisdiction of the Lord Chancellor. No presumption can be made that the proceedings were regular for the purpose of showing jurisdiction. In *O'Connell v. Reginam* the House of Lords refused to presume that even the judges were free from error. Secondly, all the counts are bad, for not showing that one calendar month had elapsed before the application to refer the bill to taxation. The statute (s. 37,) requires that one month shall have elapsed, and the interpretation clause defines a month to mean a calendar month; but the indictment merely alleges that one month had expired; and according to the authorities a month means a lunar month: (Com. Dig. Ann. B. 1.) The only exception is where it relates to mercantile accounts. If so, the jurisdiction is not shown: (*The case of the Marshalsea*, 10 Rep. 76, b; *Rex v. Cohen*, 1 Stark. 511.)

COLERIDGE, J.—This, as well as the last objection, goes to the jurisdiction; but it seems to me that the judge must at all events have jurisdiction to entertain the application.

WIGHTMAN, J.—The judge would certainly have a right to decide whether he had jurisdiction or not, and perjury committed upon that occasion would not be *coram non judice*.

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Pashley.—Suppose an application to the court, and an order made referring the bill to taxation. Then an application to a judge and a summons issued. If upon the hearing of that summons it was admitted that the court had previously made the order, but the judge nevertheless granted the application and issued his order, in receiving affidavits upon that question he would be acting without authority.

COLERIDGE, J.—As at present advised, I should certainly say, that even in that case an indictment for perjury would lie upon those affidavits.

Pashley.—If a court of requests entertains a case involving the title to lands, it has been held that perjury cannot be assigned upon statements made on oath in the course of that inquiry: *Paine's case*, Yelv. 111.)

COLERIDGE, J.—The distinction is that there is a general jurisdiction in the one case and not in the other. A more analogous case would be the taxation of a conveyancing bill, over which the judge has no jurisdiction.

Pashley.—This is a case in which the statute gives jurisdiction under special circumstances. In *Reg. v. Bishop* (Car. & M. 302), an indictment for perjury committed in an affidavit on an interpleader rule was held bad for omitting to state that any rule had been obtained according to the provisions of the Interpleader Act. Thirdly, the indictment cannot be supported; because the matter sworn to by the prisoner was immaterial to the inquiry in hand. Upon this application to refer the bill to taxation, the fact of retainer is immaterial; the amount of the bill is the sole matter in question; the judge has nothing to do with the liability.

Materiality.

PATTESON, J.—In one respect it is very material; I always ask, upon these applications, whether the retainer is disputed; and if it is, I give the attorney leave to bring an action.

Pashley.—Then at all events the materiality ought to be sufficiently averred, and it is not so. The indictment alleges merely that it became material in showing cause against the summons to ascertain whether the said J. N. R. did retain the said W. U.; but it does not state that the affidavit was made for the purpose of showing cause, or was used in showing cause. In *Reg. v. Goodfellow* (Car. & M. 569), it was held that an averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to," is not a good averment of materiality: (*Reg. v. Hewins*, 9 Car. & P. 786.) Fourthly, the verdict and judgment do not show on which of the counts they proceed. The verdict is "guilty of the perjury and misdemeanor aforesaid;" and the judgment is "upon the premises," that is, upon the four separate charges in the indictment; but the verdict either refers to the last count only, or it is uncertain to which it refers; and in either case the judgment is bad.

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Is "misde-
meanor" *nomen*
collectivum?

But for the case of *Rex v. Powell* (2 B. & Ad. 75), it never could be contended that the terms "the perjury and misdemeanor aforesaid" could apply to four separate offences. It was said in that case that "misdemeanor" is *nomen collectivum*; but surely "felony" is much more so; if any distinct idea is conveyed by the expression *nomen collectivum*. Yet the court, in *Campbell v. The Queen* (15 L. J. M. C. 76; 1 Cox Crim. Cas. 269), held "felony" not to be *nomen collectivum*; and in *O'Connell v. The Queen* (11 C. & F. 155), great doubt has been thrown upon the authority of that case; which is to some extent expressly overruled. (He referred to the judgments of Lord Lyndhurst, 11 C. & F. 316; and of Parke, B. p. 295.) The case here is as if the several counts charged entirely separate and distinct offences. *Cumpbell v. Reginam*, cited *suprà*; *Rex v. Ward* (2 Lord Raym. 1461, 1469); and *Rex v. Salomons* (1 T. R. 249), show that if two distinct offences are charged a conviction of "the said offence" is bad.

PATTESON, J.—The ground of the decision in *Rex v. Powell* (and I am the only survivor of those who pronounced it) was simply that misdemeanor was *nomen collectivum*; as soon as that was decided the case was at an end; because it was not contended there, either that the two counts were for the same offence, nor disputed that one good count would support a judgment. The latter point is now decided by *O'Connell's case*; and if misdemeanor is *nomen collectivum*, and the last count is bad, then the judgment is bad; or if misdemeanor is not *nomen collectivum*, then the judgment applying to the last count only will be bad if that count is bad.

Pashley.—The judgment must at all events be reversed, because it is uncertain; there is no certain judgment on any one count.

COLERIDGE, J.—That depends upon the question whether misdemeanor is *nomen collectivum*.

Pashley.—The words are "the perjury and misdemeanor;" which cannot mean several perjuries and misdemeanors. There is a series of blunders in the proceeding. The plea is to all the premises; the verdict is guilty of one only; and then the judgment is given upon that verdict, and the premises generally. Lastly, the conclusion of the indictment is wrong. It is in the past instead of the present tense (*Rex v. Perin*, 2 Saund. 393; *Reg. v. Allwoy*, 1 Vent. 170); and the conclusion of an indictment is material and cannot be rejected as surplusage: (*Heydon's case*, 4 Rep. 41, a, 42, b; *Rex v. Bromley*, 1 Vent. 13.)

Bliss, *contra*.—Between this case and that of *O'Connell v. Reg.* there is a material distinction; so that if it be held that there is one bad count in the indictment, and that misdemeanor is not *nomen collectivum*, the court will then have to consider whether that case is to be carried any further. In that case the judgment was "for his offences aforesaid," and Baron Parke said, "Two modes suggested themselves to me, by which this apparent error could be rectified. The first is, that the Court of Error is to pre-

sume that the court below has given judgment on those counts of the indictment only on which it was warranted to give judgment; viz., on the good counts with sufficient findings thereon. The second, that the judgment may be read as one of the same imprisonment, and the same fine for each offence. To the first of these modes of supporting the judgment there are two objections; one that the supposition does not accord with the terms of the judgment. *If the judgment had been general,—‘therefore it is considered that the defendant be imprisoned,’—this objection would not have been of weight;* but it is ‘that he be imprisoned for his offences aforesaid,’ that is, all the offences;” and Lord Campbell, in delivering his judgment, said, “Then can the general judgment stand professing to proceed on the bad counts and the bad findings as well as on the other good counts and good findings? Agreeing with Mr. Baron Parke and Mr. Justice Coltman, my opinion is, that part of the punishment must be taken to be awarded in respect of the supposed offences charged in the 6th and 7th counts, which do not amount to offences in point of law for which the defendants are answerable, and part in respect of the offences duly charged in the 1st, 2nd, and 3rd counts, of which they have not lawfully been found guilty. This is clearly the language of the record, to which faith must be given. After setting forth the eleven counts of the indictment, with the findings upon each, repeating in so many words the charges in the first three counts, it thus proceeds: ‘Whereupon, &c., it is considered and adjudged by the said court here that the said defendant, *for his offences aforesaid*, do pay a fine, &c.’ There is no *nolle prosequi* as to the bad counts, and nothing to prevent the judgment from applying to the defective findings, or the counts on which there was no lawful verdict; because all the counts and all the findings were believed in the court below to be sufficient. Therefore, according to the plain use of language and the common sense of mankind, by this judgment the defendants are punished for charges which do not amount to crimes in the eye of the law, and for crimes of which they have not been lawfully convicted.” This judgment, therefore, is different in form from that adopted in *O’Connell’s case*; and whether misdemeanor be *nomen collectivum* or not, the judgment may stand. If it be held that “the perjury and misdemeanor” applies to one offence only, still the judgment is good; because only one offence appears. Looking at the different counts of the indictment, they refer to the same fact differently charged; and that does not vitiate the indictment. But “misdemeanor” is *nomen collectivum*, and applies to all the counts. Secondly, the jurisdiction to administer the oath sufficiently appears. This does not depend merely on the common law; for the 23 Geo. 2, c. 11, applies; and that renders it sufficient to set forth the substance of the offence. If therefore it appears that the oath was administered in the course of a judicial proceeding, the indictment is good. The ordinary precedents do not show jurisdiction. They state merely “that an indictment for felony was pending,” or “that

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a certain issue came on to be tried;" or "that a rule of court was granted to show cause, &c.;" and it is not necessary to show the commission; it is enough to allege the authority. In *Rex v. Dowlin* (5 T. R. 311, 317), Lord Kenyon said that it was not necessary for the prosecutor to set out in the indictment the commission at the Admiralty. In this case, however, if it were necessary to show the jurisdiction, it is sufficiently shown. It is clear that at the least the judge had jurisdiction to enter upon the inquiry,—he had jurisdiction to refuse to make the order; and here the rule is applicable that nothing shall be intended against the jurisdiction of a superior court. But the stat. 23 Geo. 2, c. 11, gives another answer; because that statute does away with the necessity of stating more than the application, or rather so much of it as may be necessary to show that the oath was administered in the course of a judicial proceeding. It is said that a certain fact ought to have been negatived; but if it had been negatived, how would that have shown jurisdiction? The jurisdiction must depend upon the application stated to the judge; and by the statute it is not necessary to set that out. *Rex v. Smith* was the case of an inferior court, the authority of which it was necessary to show. *Rex v. Jones* (4 B. & Ad. 345), was an indictment for conspiracy, not perjury. The cases of *Rex v. Punshon* (3 Campb. 96); *Reg. v. Ewington* (2 Moo. C. C. 223; Car. & M. 319); and *Reg. v. Bishop* (Car & M. 302), were questions of evidence not arising on the record; and they are therefore no authority against the crown on the present occasion. As to the materiality of the false statement—

LORD DENMAN, C. J.—We are all clearly of opinion that if there was jurisdiction, the question was material.

"Aforesaid."

Bliss.—Then, as to the judgment, it is free from the objection of uncertainty; because the words "perjury and misdemeanor aforesaid" mean "last aforesaid;" and the sentence is warranted by the last count. In *Campbell v. Reginam* (15 L. J. M. C. 76; 1 Cox C. C. 269), the difficulty arose because the last count did not warrant the judgment. There are many authorities which show that the word "aforesaid" refers to the last antecedent. In *Rex v. Richards* (1 M. & Rob. 177), on an indictment alleging a dwelling-house to be "situate at the parish aforesaid," it was held that the parish last mentioned must be intended. *Reg. v. Rhodes* (2 Ld. Raym. 886); *Sutton v. Fenn* (3 Wils. 339; S. C. Blackst. 848); *Morgan's case* (Cro. El. 101); *Childe v. Towers* (ib. 311); *Ross v. Morris* (ib. 436), (a) are to the same effect. So that the effect of this record is, that though the defendant pleaded to the whole indictment, he is found guilty on the last count only.

PATTESON, J.—According to your construction this record shows a plea to the whole; but a *venire juratores* to try the last count only.

Bliss.—The jury may not have been charged to inquire of the

(a) See *Bishop v. Grant*, Cro. El. 324.

remainder; and in the award of the *venire* it is unnecessary to specify what the jury are to try,—it is usually inserted; but it is mere surplusage,—an old form which is a relique of the practice of summoning the jury from the *visne*, on account of their personal knowledge of the facts. Indeed, no award of a *venire* is necessary at all; it is altogether surplusage. The justices of gaol delivery have authority to summon a jury; and, if it appears that a jury came under that authority, the judgment may be sustained: but usually the record is made up as of a proceeding under both commissions, that of oyer and terminer and that of gaol delivery. In the next place, assuming that the court should not construe ‘aforesaid’ to mean “last aforesaid,” it is submitted that “misdemeanor” is *nomen collectivum*. The authority of *Rex v. Powell* (2 B. & Ad. 75), unreversed by *O’Connell v. Reginam*, is express upon the point; and the question is concluded. A judicial decision on the meaning of a particular term of art, as “misdemeanor” is, removes all further inquiry. It is *nomen collectivum*, because it has been so decided; and it is no answer to say that “felony” is not *nomen collectivum*; as the court decided in *Campbell v. The Queen*. The jury have also given that meaning to the term, for they say that the defendant is guilty of the perjury and misdemeanor aforesaid in manner and form as by the said indictment is supposed,—that is, by the whole indictment, not merely a part of it. *Modo et forma* makes the general traverse apply to the whole of the allegation involved therein: (*Weathrell v. Howard*, 3 Bing. 135). If the word “aforesaid” does not restrict the verdict to the last count, what does it refer to? Clearly to the whole indictment. Lastly, as to the conclusion of the indictment, although the past tense is used, the words at the commencement “it is presented, &c.,” control the whole; and “where matter is nonsense by being contradictory and repugnant to somewhat precedent; there the precedent matter, which is sense, shall not be defeated by the repugnancy which follows; but that which is contradictory shall be rejected:” (per Lord Holt in *Wyatt v. Aland*, Salk. 325; and *Rex v. Stevens*, 5 East, 244, 255.) Here therefore the words “and the jurors did say,” or the word “did,” may be rejected, in order to remove the contradiction. The whole conclusion, however, is surplusage, and may on that ground be rejected. This conclusion is necessary in murder; because murder is a term of art, which must be used in an indictment for murder, and which never appears in any other part of the indictment. Here it is a mere conclusion of law.

LORD DENMAN, C. J.—Is not *perjury* as much a term of art as murder?

Bliss.—In Hawk. P. C. lib. 2, c. 23, s. 77, the various terms of art are mentioned, and perjury is not one of them.

COLERIDGE, J.—Is not the punishment in this case one imposed by statute alone; and must there not therefore be the conclusion *contra formam statuti*? (a)

(a) See *contrd*, *Williams v. Reg.* 7 Q. B. 250.

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THE QUEEN
v.
J. MITCHEL.
—
Crown and
Government
Securities Act.

The Hon. *John Plunket*, Q. C.; *Baldwin*, Q. C.; *Whiteside*, Q. C.;
Smyly; and *John Perrin*.
Counsel for the prisoner :—*Robert Holmes*; *Sir Colman O'Loughlen*; *J. E. Pigot*; and *John O'Hagan*.
Agent for the crown :—*Kemmis* (crown solicitor).
Agent for the prisoner :—*Martin Francis O'Flaherty*.

COURT OF EXCHEQUER.

February 26, 1848.

RYALLS v. REGINAM.(a)

Perjury—Indictment—Summons to tax an attorney's bill—Lunar or calendar month—Several counts—General verdict and judgment.

In an indictment for perjury alleged to have been committed in an affidavit sworn, before showing cause, in answer to an application by an attorney for taxation of his bill after the expiration of one "month" from its delivery, it is not necessary to negative any application by the party chargeable before the expiration of the month, inasmuch as the judge would have jurisdiction to issue the summons and commence the inquiry whether any such application had been made or not.

The indictment used the word "month :"

Held, that as the stat. 6 & 7 Vict. c. 73, was expressly referred to in the indictment, the same construction must be given to that word in the indictment as in the statute; and that therefore it must be held to mean "calendar month."

A count of an indictment for perjury concluding thus, "And so the jurors, &c., did say that the said J. N. R., &c., did commit wilful and corrupt perjury," is not bad, because the whole averment may be rejected as surplusage.

The affidavit denied the retainer :

Held, that the retainer was a material fact to be ascertained, and that therefore perjury might properly be assigned upon the statement denying it.

"Misdemeanor" is nomen collectivum; and therefore where the venire was to try "whether the said J. N. R. be guilty of the perjury and misdemeanor aforesaid or not guilty;" and the verdict was "guilty of the perjury and misdemeanor aforesaid, in manner and form as by the said indictment is supposed against him:"

Held, that there was no uncertainty in either; that both the venire and the verdict applied to all the counts; and that a general judgment of imprisonment "upon the premises," was good.

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THIS was a writ of error brought upon the following record :—
Yorkshire, to wit.—Be it remembered, that at the special session of gaol delivery and oyer and terminer, holden at York, &c., on Saturday, the 6th day of December, in the ninth year of

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

Queen Victoria, &c., by the oath of, &c., it is presented that one William Unwin, after the passing of a certain Act of Parliament, &c., (6 & 7 Vict. c. 73,) and before and at the time of the committing of the offence hereinafter mentioned, was an attorney practising in England, and was duly admitted and practising as such attorney in Her Majesty's Court of Exchequer at Westminster, and had done and transacted business as such attorney in her said Court of Exchequer, for and on behalf of J. N. Ryalls, late of, &c., and of J. Ironsides, and on the retainer and at the request of the said J. N. Ryalls; and the said J. N. Ryalls, and the said J. Ironsides, then and there became and were indebted in a large sum of money to the said W. Unwin, for fees, charges, and disbursements for the business so done and transacted for the said J. N. Ryalls and the said J. Ironsides, by the said W. Unwin as aforesaid, and the said W. Unwin afterwards and before the committing of the said offence hereinafter mentioned, to wit, on, &c., so being such attorney as aforesaid, did deliver to the said J. N. Ryalls and the said J. Ironsides (they the said J. N. Ryalls and the said J. Ironsides, then and there being the parties to be charged therewith), a bill for the fees, charges, and disbursements for the said business so done and transacted by the said W. Unwin, as such attorney as aforesaid, which said bill was then and there subscribed with the proper handwriting of him the said W. Unwin, so being such attorney as aforesaid; and that no application was made to the said Court of Exchequer, so being the Court in which the said business was so done and transacted as aforesaid, or to any judge thereof, or to any court or judge whatever, by the said J. N. Ryalls and the said J. Ironsides, so being the parties charged by the said bill, or by either of them, within one month after the said delivery of the said bill, nor did the court of Exchequer, &c. within one month, &c. refer the said bill and the demand of the said W. Unwin as such attorney as aforesaid thereupon, to be taxed by the proper or any officer of the said Court of Exchequer, or of any other court. And by the jurors aforesaid, upon their oath aforesaid, it is further presented, that afterwards, and after the expiration of one month after the delivery of the said bill as aforesaid, and before the committing of the said offence hereinafter mentioned, to wit, on, &c., at, &c., the said W. Unwin, so being such attorney as aforesaid (the said bill then and there remaining due, unpaid, and unsatisfied to him the said W. Unwin), did make application to Sir R. M. Rolfe, Knt., then and there being one of the judges of the said Court of Exchequer, in which the said business was so done and transacted by the said W. Unwin as aforesaid in the matter of him the said W. Unwin, to refer the said bill so delivered as aforesaid, and the demand of him the said W. Unwin thereupon, to be taxed and settled by the proper officer of the said Court of Exchequer. And thereupon afterwards, to wit, on, &c., at, &c., the said Sir R. M. Rolfe, so being the judge of the said Court of Exchequer as aforesaid, issued a summons in the matter of the said W. Unwin, requiring the said J. Ironsides and the said J. N. Ryalls, or their

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attorney or agent, to attend the said Sir R. M. Rolfe, at his chambers in Rolls Gardens, on, &c., to show cause why (amongst other things) the said W. Unwin's bill of costs in the causes and matters delivered to the said J. Ironsides and J. N. Ryalls, should not be referred to the master of the said Court of Exchequer to be taxed, (the said bill of costs in the said summons mentioned, then and there being the said bill for the fees, charges, and disbursements for the said business so done and transacted by the said W. Unwin, as such attorney as aforesaid, and so delivered by the said W. Unwin as aforesaid).

And by the jurors aforesaid, upon their oath aforesaid, it is further presented that the said J. N. Ryalls, afterwards and before the time appointed for showing cause, and before showing cause against the said application and the said matters mentioned in the said summons, to wit, on, &c., at, &c., came before H. W., then and there being a commissioner duly authorized and appointed to take and receive affidavits touching and concerning matters depending in the said Court of Exchequer, and touching and concerning the matter of the said W. Unwin, in the said summons mentioned; and it then and there became and was material in showing cause why the said bill of costs, in the said summons mentioned, should not be referred to the said master to be taxed, as in the summons mentioned, to ascertain whether the said J. N. Ryalls did retain or employ, or otherwise authorize the said W. Unwin to act as attorney for him the said J. N. Ryalls and the said J. Ironsides, or for either of them, in or about the business mentioned in the said bill of costs of the said W. Unwin, in the said summons mentioned, or in or about any part of such business, and whether the said J. N. Ryalls had ever retained or employed the said W. Unwin to act as attorney or agent for him the said J. N. Ryalls. And the said J. N. Ryalls so having come and being before the said H. W., so being such commissioner so authorized and appointed as aforesaid, then and there produced a certain affidavit in writing of him the said J. N. Ryalls in the matter of the said W. Unwin, in the said Court of Exchequer, and then and there before the said H. W., in due form of law, was sworn and took his corporal oath upon the Holy Gospel of God concerning the truth of the matters contained in the said affidavit (he the said H. W. then and there having a lawful and competent power and authority to administer the said oath to the said J. N. Ryalls in that behalf); and that the said J. N. Ryalls not having the fear of God before his eyes, but intending to cheat and defraud the said W. Unwin of the said fees, charges, and disbursements, then and there, upon his oath aforesaid, before the said H. W., (he the said H. W. then and there having a lawful and competent power and authority to administer the said oath to the said J. N. Ryalls in that behalf), falsely, corruptly, knowingly, wilfully, and maliciously, in and by his said affidavit in writing in the matter of the said W. Unwin, in the said Court of Exchequer, did depose and swear (amongst other things) in substance and to the

effect following, that is to say, that he the said J. N. Ryalls, referred to in the summons of the Honorable Baron Rolfe in that matter (meaning the summons of the said Sir R. M. Rolfe, Knight, in the said matter of the said W. Unwin above mentioned), did not retain or employ the said W. Unwin (meaning the said W. Unwin) to act as attorney for him (meaning the said J. N. Ryalls), and J. Ironsides (meaning the said J. Ironsides), also mentioned and referred to in the said summons, or for either of them, in and about the business mentioned in the said W. Unwin's bill of costs delivered to him the said J. N. Ryalls and the said J. Ironsides, (meaning the said bill of costs in the said summons mentioned, and the bill so delivered by the said W. Unwin to the said J. N. Ryalls and the said J. Ironsides as aforesaid), or in or about any part of such business; and that he the said J. N. Ryalls never retained or employed the said W. Unwin to act as attorney or agent for him the said J. N. Ryalls, in any cause or matter whatever, as in and by the said affidavit of the said J. N. Ryalls, in the said matter of the said W. Unwin, more fully and at large appears: whereas, in truth and in fact, the said J. N. Ryalls did, to wit, on, &c., at, &c., retain and employ, and authorize the said W. Unwin to act as attorney for him the said J. N. Ryalls and J. Ironsides, in and about the business mentioned in the said W. Unwin's bill of costs, so delivered to the said J. N. Ryalls and the said J. Ironsides as aforesaid, and in and about every part of such business; and whereas, in truth and in fact, the said J. N. Ryalls had, to wit, on, &c., at, &c., retained and employed the said W. Unwin to act as attorney and agent for him the said J. N. Ryalls, in the said business in the said Court of Exchequer as aforesaid. And so the jurors aforesaid, upon their oath aforesaid, did say that the said J. N. Ryalls, on, &c., at, &c., before the said H. W. (he the said H. W. then and there having such lawful and competent power and authority as aforesaid), by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

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The 2nd count differed from the 1st only in stating that the business was done on the retainer of J. N. Ryalls and J. Ironsides.

The 3rd and 4th counts were the same as the 1st and 2nd counts respectively, except that the averment negating any application to the Court of Exchequer by the parties chargeable within a month, was omitted.

The record then proceeded to set forth a *venire* to the defendant to appear and "answer the premises" at the next gaol delivery for the county of York, and his appearance in obedience thereto. It then proceeded: "And being brought to the bar here in his

JOHN BROOME the statement of time is insufficient ; it is unmeaning^(a). [PLATT,
v. B.—Is it not cured by the 7 Geo. 4, c. 64, s. 20?] It is difficult
REGINAM. not to concede that.
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Corner, for the crown, was stopped.

PARKE, B.—It is not necessary to trouble the other side. On the first point we are all agreed that if there is anything in the objection, it is cured by the caption ; or rather, taking the indictment and caption together, there is no objection at all. On the other point it is conceded that even if the indictment be wrong, the defect is cured by the statute.

Judgment affirmed.

CROWN CASE RESERVED.

Saturday, April 29, 1848.

(Before all the Judges, except ALDERSON, B.)

COLERIDGE, J. and MAULE, J.)

REG. v. WHITAKER AND OTHERS. (b)

Night Poaching Act—Entering land—Constructive entering.

Under the 9th section of 9 Geo. 4, c. 69, if several persons are indicted for entering enclosed land by night armed for the purpose of taking game, it is not necessary to prove that all entered the enclosed land; it is enough if some are proved to have entered the land, and the rest are shown to have been engaged with them in a common object, and to have been near enough to render assistance.

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THE six prisoners were found guilty before Wilde, C. J., at the last assizes for Derby, of having been in enclosed land at night, armed to take game, contrary to 9 Geo. 4, c. 69, but the learned judge, feeling some doubt as to the propriety of the conviction, reserved the following case for the opinion of the judges.

The enclosed land was a field occupied by Ratcliffe. The prisoners were in company in a lane by the side of Ratcliffe's field, and were seen there to employ themselves in setting nets between the ditch and the hedge of the field to take game. One of the prisoners remained with the nets, and the rest divided into two parties, and went round the field; three or four of the prisoners, with two dogs, were seen at one time beating in the field for

(a) Does it not necessarily mean the 10th year of the reign? That is, the 10th year of her being Queen. Sect. 2 Hawk. P. C. c. 23, s. 90; c. 25, s. 80; and *Rex v. Challoner*, 1 Lev. 113.

(b) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

game. The witness stated that he saw the six prisoners come out of the field and go together to the nets and take them up, and afterwards proceed in company in a direction leading to the town of Derby. The prisoners were kept in view from the time they took up the nets until they were taken into custody. The prisoners were at the time, and under the circumstances above mentioned, all associated and engaged in the common purpose and object of taking game in Ratcliffe's field. When the prisoners had proceeded some distance, several men, who had been sent for by the keeper, came up, and the prisoners were then stopped and attempted to be taken into custody; they resisted, and a conflict ensued; ultimately they were all captured. At the time the prisoners were stopped four of them had knives or bludgeons, and two of them drew knives from their pockets and threatened to stab or rip up the takers. The prisoners' counsel objected that the evidence did not sufficiently prove that all the prisoners had been in the field, the witness having only seen three or four at one time, and that none could be properly convicted who had not been in the field, and as those who had been in the field could not be identified, all must be acquitted. Although the witness said he saw all the prisoners come out of the field, I did not think the evidence sufficiently certain that all had actually been in the field, and I directed the jury to consider whether all the prisoners were at the time associated and engaged in pursuing the common purpose and object of taking game by some of them going armed into the field and there beating for game, while others rendered their aid by remaining outside of the hedge, and I directed the jury that if they were satisfied that all the prisoners were so engaged they were all liable to be found guilty, although the witnesses could not identify which of the prisoners actually entered the field and beat for game. The case was left to the jury upon the assumption that some of the prisoners had never entered the field. I require the advice of the judges if the direction was right in point of law.

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A question arose during the trial as to the effect of the two men having knives in their pockets while in the field, but I think that question is precluded by the verdict of the jury respecting the four men having sticks in the field, which was a sufficient warning by the whole.

Willmore, for the prisoner.—This question turns on the construction of the 9th section of 9 Geo. 4, c. 69, which enacts, that if any persons to the number of three or more together, shall, by night, unlawfully enter or be in any land, whether open or enclosed, for the purpose of taking or destroying game, any of such persons being armed with any gun, &c., each and every of such persons shall be guilty of a misdemeanor. And it is submitted that no person can be convicted under that section who has not "entered" the open or enclosed land. There can be no constructive presence upon the land. This is a penal statute creating an offence; and the offence itself is *malum prohibitum*,

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not *malum in se*. Indeed, it is a *malum prohibitum* upon a *malum prohibitum*; for poaching itself is not *malum in se*; and this is an offence created for the further prevention of poaching. Then a penal law cannot be extended by construction, so as to supply a *casus omissus*. No case can be brought under its operation, which is not within the plain and ordinary meaning of the words (Dwarris on Stats. pp. 711, 737; East P. C. p 592, c. 16, s. 41; per Lord Mansfield in *Rex v. Parker*); and, to use the language of Baron Graham (*R. v. Brady, Stark. Cl. Pl. 84 n.*), the rule of constructive presence at common law does not apply to an offence created by statute.

Now the words of this statute give to the offence the ingredient of locality; and there can be no constructive presence at a given place, though there may be at a given transaction. For example, a person might be found guilty of poaching, though he took no other part in the transaction than that of watching at some distance; because the offence of poaching is not confined to any particular locality. For the same reason the cases of constructive presence at the commission of a larceny or even a burglary are not analogous. The judges have defined the offence of burglary so that it may include not only the breaking and entering a house by night, but the rendering of assistance outside the house to the persons who break and enter; this statute, however, leaves nothing to construction, definition, or further development. A perfectly good indictment for burglary might be drawn by stating the facts—that the prisoner being engaged in a common design with the persons who broke and entered, aided and assisted in the execution of that design, without stating that he broke and entered the house; but no good indictment could be drawn under this section, without stating that the prisoner entered the enclosed land. Such an indictment would not show an offence *contra formam statuti*, if it showed one *contra spiritum statuti*. The line must be drawn somewhere, or, the poulterer in London, who had agreed to become the purchaser of the spoil, might be included in the indictment, and if there may be a constructive presence why not a constructive extension of time also? and why may not the offence be committed between other hours of the night than those specified? The proper rule, therefore, is to adhere to the plain intelligible words of the Act; and, in this case, by so doing the main object of it will be answered; for the main object of the Legislature was to prevent the fatal violence arising from collision with the keepers; and that violence could not take place unless the land was entered. In a note by Mr. Greaves to the last edition of Russell on Crimes (vol. 1, p. 476, n. b.), there is a learned argument in support of this construction of the statute.

Another section of the statute also strongly favours this construction. Sect. 2 provides that where any person shall be found upon any land committing any such offence, it shall be lawful for the owner or occupier, &c., to seize such offender, and apprehend him *upon such land*, or in case of pursuit being made in

any other place to which he *may have escaped therefrom*; which clearly implies that there must be a bodily entry upon the land.

Two subsequent statutes (1 & 2 Will. 4, c. 32, ss. 31 & 32; and 7 & 8 Vict. c. 29), support the same view. The latter statute was expressly passed to provide for the case of persons beating for game outside the enclosure; and would have been quite unnecessary if the 9th section of 9 Geo. 4, c. 69, would be satisfied by a constructive and not a personal presence in the enclosed land. With reference to the decisions on the point, Patteson, J., has decided that the personal entry of all on the land is required (*Rex v. Dowsell*, 6 Car. & P. 398); but Alderson, B., has intimated a contrary opinion: (*Rex v. Lockett*, 7 Car. & P. 300).

No counsel were instructed on the part of the crown.

Cur. adv. vult.

Afterwards the judges who heard the argument assembled to consider the case, and a majority held that the direction of the learned judge was right; but the following learned judges were of a contrary opinion—Parke, B., Patteson, J., Rolfe, B., Cresswell, J., and Platt, B.

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v.
WHITAKER
AND OTHERS.
Night Poaching
Act.

MIDLAND CIRCUIT.

Northampton, March 2, 1848.

(Before WILDE, C. J.)

REG. v. THOMAS CRANE. (a)

Jurisdiction—Special local commissions.

An offence was committed within a separate locality, which had a body of justices exercising jurisdiction within the liberty, by virtue of three separate commissions; 1st, the ordinary commission of the peace; 2nd, a commission to try all treasons, misprisions of treasons, insurrections, murders, felonies, manslaughterers, &c.; the 3rd, a general commission of gaol delivery. Neither of the commissions contained any non intromittant clause, but the general county magistrates, in fact, exercised no jurisdiction within the liberty, which had a gaol and separate custos rotulorum and clerk of the peace.

Held, that these commissions did not oust the jurisdiction of Her Majesty's Justices of Gaol Delivery for the whole county; and that the prisoner having been removed from the liberty by writs of habeas ad deliberandum, and recipias corpus, was properly tried by such justices.

THE prisoner was indicted under the 7 Will. 4 & 1 Vict. c. 36, s. 26, for stealing a post letter containing a valuable security. The venue in the indictment was simply laid as "Northamptonshire," and the offence was charged to have been committed at Peterborough,

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v.
CRANE.
Jurisdiction.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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in the county of Northampton. It was proved in evidence that the offence was committed at Peterborough, and that Peterborough is locally situate within the county of Northampton, but is also within a peculiar jurisdiction called "The Liberty of Peterborough," which comprises thirty-three parishes or townships all locally situate within the county of Northampton. The liberty has a separate gaol to which persons committing offences are habitually committed, and with which the said sheriff or magistrates of the county of Northampton do not in any way interfere. The liberty does not contribute to the county rate, but a rate is levied within it called the liberty rate in the nature of a county rate. The gaol is supported out of this rate, which is applied to the same purposes generally within the liberty, as the county rate in the body of the county. The liberty gaol has been rebuilt within a few years, at a cost of 10,000*l.* at the expense of the liberty. The magistrates for the county of Northampton exercise no jurisdiction within the liberty, but there is a body of justices who act under the powers conferred by three distinct commissions, which were produced in evidence. The liberty has a separate *custos rotulorum*, who appoints a clerk of the peace for the liberty. The commissions are by letters patent, respectively dated 22nd December, 9th Vict. and the same parties are named in each commission. One commission appoints the parties named jointly and severally to be justices to keep the peace in and for the liberty of Peterborough, in the county of Northampton, and authorizes them, and every two of them, to inquire of all felonies, &c. and other crimes and offences of which the justices of the peace may or ought lawfully to inquire. This commission is the ordinary commission; a second is in the following words:—

"Know ye, that we have assigned you and any four or more of you our justices to inquire more fully by the oath of good and lawful men, of the liberty of Peterborough, in our county of Northampton, by whom the truth of the matter may be better known, and by other ways and methods by which you shall or may better know of all treasons, misprisions of treason, insurrections, &c., &c., and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings, &c., &c., and all other evil doings, offences, and injuries whatsoever; and also the accessaries of them, within the liberty aforesaid, by whomsoever and in what manner soever done, committed, or perpetrated, and by whom, &c., &c., and the said treasons and other premises to hear and determine according to the laws and customs of England; and, therefore, we command you that at certain days and places which you or any four or more of you shall appoint for this purpose, you do make diligent inquiries about the premises, and hear and determine all and singular the premises, and do and fulfil them in form aforesaid, doing therein what to justice appertains, according to the laws and customs of England, saving to us the amerciaments and other things from hence to us accruing. Further we command by the tenor of these presents the bailiff of the liberty aforesaid, that

at certain days and places, which you or any four or more of you shall make known to him, he cause to come before you or any four or more of you, so many and such good and lawful men of the liberty aforesaid, by whom the truth of the premises may be better known and inquired into."

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The third commission is as follows:—

"Know ye, that we have constituted you and any three or more of you our justices, to deliver our gaol within the liberty of Peterborough, in our county of Northampton, of the prisoners therein being. And therefore we command that at certain days and places which you or any three or more of you shall appoint for this purpose, you meet at the said liberty to deliver that gaol, doing therein what to justice appertains according to the laws and customs of our Kingdom of England, saving to us the amerciaments, &c. Further we command the bailiff of the liberty aforesaid, that at certain days and places which you or any three or more of you shall acquaint him with, he cause all the prisoners of the same gaol, and their attachments before you or any three or more of you to come."

Neither of the commissions contains any clause professing to exclude other jurisdiction. It was proved that the powers given by these commissions are regularly exercised. That courts are held quarterly, which are termed Sessions of the Peace and Courts of Oyer, Terminer, and General Gaol Delivery for the Liberty of Peterborough. That precepts signed by four justices are issued quarterly to the liberty bailiff, requiring him to summon juries, and that the three commissions are regularly read at each court. That jurors from the liberty of Peterborough do not serve on crown juries at the assizes for the county. The clerk of assize stated that prisoners had been occasionally committed to the assizes by the liberty magistrates, and that orders have been made on the treasurer of the liberty of Peterborough, for payment of the costs of the prosecutions. It was also proved that on the 11th January, the prisoner was in due form committed to the common gaol of the liberty, to take his trial at the next General Gaol Delivery of the liberty of Peterborough, to be held on the 1st April next. That the prosecutor was bound by recognizance to prefer a bill of indictment, and the witnesses to appear and give evidence accordingly. That the prisoner remained in the gaol of the liberty till the 23rd February, when he was removed to the county gaol under writs of *habeas corpus ad deliberandum* and *recipias corpus*.

Mellor, for the prisoner, objected that the offence was complete within the liberty of Peterborough; that he had been regularly committed for trial before the court of that liberty, which was a court of competent jurisdiction; and that under such circumstances, the writ of *habeas corpus ad deliberandum* would not lie to remove the prisoner. That the *venue* in the indictment was erroneous; and that the grand jury of the county of Northampton had no jurisdiction to find a bill, nor the court any power to try the prisoner; and that at all events, special matter should have been alleged to justify the preferring the indictment in the county at large.

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—
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Waddington and Willmore, for the prosecutor.—The general jurisdiction of the justices of Oyer and Terminer and Gaol Delivery for the whole county is not precluded by these peculiar commissions, without express words of exclusion. At all events this is an offence punishable by transportation for life; and is, therefore, not triable by any sessions of the peace: (5 & 6 Vict. c. 38).

Mellor.—That statute does not apply except to general or quarter sessions of peace, and not to a court of Oyer and Terminer and Gaol Delivery.

WILDE, C. J.—My impression is that this was settled in the cases of treason at Bristol, and that the general jurisdiction is not excluded by the special jurisdiction without express words.

The jury found the prisoner guilty. The learned judge intimated that he would further consider the question, and if ultimately he entertained any serious doubt he would submit the case to the judges; but his Lordship afterwards did not think it necessary to do so.

The prisoner was sentenced to transportation for seven years.

WESTERN CIRCUIT.

WILTS SUMMER ASSIZES, 1848.

Devizes, August 14.

(Before Mr. Justice COLERIDGE.)

REG. v. MARTIN AND BUTT. (a)

Practice—Counsel—Prisoner's defence.

Where one prisoner was indicted for stealing and the other for receiving, and the receiver was defended by counsel, but the principal felon was undefended, the court called upon the principal to make his statement to the jury before the counsel for the receiver was permitted to address them.

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v.
MARTIN
AND BUTT.
—
Practice.

PRISONERS were indicted, Martin for stealing, and Butt for receiving, a horse.

T. W. Saunders defended Butt.

The other prisoner, Martin, was undefended.

The case for the prosecution having closed,

Saunders rose to address the jury for the prisoner, Butt.

COLERIDGE, J.—I think the other prisoner, as the principal, should first make his statement.

Verdict, Guilty.

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

WESTERN CIRCUIT.

WILTS SUMMER ASSIZES, 1848.

Devizes, August 14.

(Before Mr. Justice WILLIAMS.)

REG. v. COLLIER AND MORRIS. (a)

Evidence—Confession.

The prosecutor, in the presence of the constable, said to the prisoner, "It will be better for you to tell the truth, as it will save the shame of a search warrant in your house." The statement was rejected. The constable then took the prisoner into a loft, and, in the absence of the prosecutor, the prisoner made a statement. The evidence was rejected. Half an hour after, the constable took the prisoner to the station-house, and on the way cautioned him not to say anything, after which he made a statement.

Held, to be inadmissible, as the inducement was still operating.

LOPES, for the prosecution, proposed to prove a confession by Morris made to the constable, the prosecutor.

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MORRIS.

It was then proved that, previously to his making the confession, prosecutor said to prisoner that it would be better for him to tell the truth, as it would save the shame of a search warrant in his house. Evidence.

Slade, for prisoner, objected to the reception of the confession. It had been obtained by an improper inducement.

WILLIAMS, J.—It is clearly not admissible.

Lopes then proved that the constable took the prisoner up stairs into a loft and had some conversation, and proposed to put in evidence a confession there made to the constable, in the absence of the prosecutor.

Slade objected. The inducement was still operating.

WILLIAMS, J., allowed the objection.

Lopes then proposed to show that, half an hour afterwards, on the constable taking the prisoner to the station-house, in the absence of the prosecutor, he cautioned the prisoner not to say anything against himself, and that after this caution prisoner made a statement.

Slade objected that the influence produced by the prosecutor's inducement was still operating upon the prisoner's mind, and that even after the constable's caution nothing that he said was admissible.

WILLIAMS, J.—These are all cases of degree. I am not satisfied that the influence was removed. I shall refuse to receive the evidence tendered.

Lopes for the prosecution.

Slade for the prisoner.

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

WESTERN CIRCUIT.

DEVON SPRING ASSIZES, 1848.

Exeter, March.

(Before Baron PLATT.)

REG. v. COX. (a)

Indictment—Shooting.

In an indictment for maliciously shooting, under stat. 1 Vict. c. 84, s. 4, it is sufficient to say "with a certain loaded gun," without going on to state with what it was loaded.

REG. v. COX.
Indictment.

PRISONER was indicted for attempting to discharge "a loaded gun" at the prosecutor, with intent to disable him.

Rowe, for the prisoner, objected that the offence was insufficiently described. All the precedents aver the materials with which the gun is loaded, as thus: "A certain gun then and there loaded with gunpowder and certain leaden shot;" and for good reason. The essence of the crime is the intent to disable, and it depends upon the materials with which the gun is charged whether there exists such an intent. Those materials must be something that would accomplish that intent. As, for instance, if it had been charged only with a detonating cap. In the case of *Reg. v. Carr* (R. & R. 377), it appeared that the gun was loaded, but the jury found that it was not primed, and a majority of the judges considered it equivalent to a finding that it was not loaded so as to be capable of doing mischief by pulling the trigger, and were therefore of opinion, that it was not *loaded* within the meaning of the statute. So, if a pistol be loaded with powder and a bullet, but the touch-hole be plugged so that it cannot possibly be fired, it is not "loaded arms," within the meaning of the statute: (*R. v. Harris*, 5 C. & P. 159.) If, therefore, the statute does not use the word "loaded" in its ordinary sense, but as a gun or pistol *so* loaded as to be in a condition to disable, it will not be sufficient in the indictment to charge that it was loaded only, but the manner of the loading must be so described as to bring it within the kind of loading intended by the statute.

PLATT, B.—I see no reason to depart from the ordinary meaning of the English language, which applies to the word "*loaded*" the meaning of "*loaded with something dangerous.*"

Verdict, Guilty.

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

COURT OF QUEEN'S BENCH.

Wednesday, June 14.

REG. v. THE INHABITANTS OF FIFEHEAD.(a)

*Indictment for nonrepair of highway, pursuant to order of justices—
Certificate for costs.*

If upon the trial of an indictment for the nonrepair of a highway, ordered by justices under 5 & 6 Will. 4, c. 50, s. 94, it appears that the road indicted is not the road set out in the order of justices, and the prosecution fails in consequence; the judge has no jurisdiction to certify for the costs under s. 95.

INDICTMENT for nonrepair of a highway. At the trial which took place before Baron Platt at the last Spring Assizes, a verdict of not guilty was found, it appearing that the road which was described in the indictment was not the road which, pursuant to an order of justices under 5 & 6 Will. 4, c. 50, s. 94, was intended to be indicted, but in a different parish. The learned judge, however, certified for costs under s. 95, in order that the question as to his power to do so might be raised.

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v.
THE INHABITANTS OF
FIFEHEAD.
—
Indictment.

A rule was accordingly obtained within the first four days of last term to set aside that certificate.

Crowder, Q. C., and Phinn, now showed cause.—This rule is drawn up on an affidavit only, and not upon reading the order of the judge. [ERLE, J.—The master says that the *nisi prius* record, as well as the other records of the court, are always supposed to be before the court for the purpose of any motion relating to them.] Then, in this case, if the judge has any discretion as to granting the costs, about which the words of the section raise some doubt, his discretion is not to depend upon the success or failure of the prosecution. Here there was a variance certainly; the road was misdescribed; but both parties knew what they came to try; the variance was not one which could mislead. [COLERIDGE, J.—But the magistrates did not order you to indict a road in another parish.] No; but the question is whether the surveyors, acting *bona fide* upon the order of the magistrates, are to be deprived of their costs in consequence of a slip in the proceedings. In many statutes the costs are made payable only upon conviction; but here the statute says that the costs of such prosecution shall be ordered. It will be said that *such prosecution* refers only to the prosecution ordered by the justices; but whether the prosecution was ordered by them or not is a question of fact to be decided by the judge, and if he had

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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TANTS OF
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—
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any discretion to exercise, he must be taken to have exercised it in favour of the prosecutors. *Reg. v. Heanor* (1 New Mag. Cas. 172,) is quite distinguishable; because there it was found that there was no highway at all, and the whole proceeding is founded upon the assumption that there is a highway.

M. Smith, contra, was not called upon.

LORD DENMAN, C. J.—The case is quite clear. There was no jurisdiction.

COLERIDGE and ERLE, J., concurring,

Rule absolute.

COURT OF QUEEN'S BENCH.

Monday, April 17, 1848.

REG. v. THE INHABITANTS OF THE TITHING OF EAST MARK.(a)

Indictment for nonrepair of highway—Evidence of dedication.

Public user of a road for fifty years is evidence from which a jury may infer a dedication, though it may not be clear in whom the ownership of the soil is vested.

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v.
THE INHABI-
TANTS OF THE
TITHING OF
EAST MARK.
—
Indictment.

INDICTMENT for the nonrepair of a road.

Plea, Not guilty. The trial took place before Mr. Justice Williams at the Somersetshire Spring Assizes, 1847, when a verdict was found for the crown, leave being reserved to the defendant to enter it for him.

At the trial it appeared that the road in question had been originally set out as a private road, under a local and private Act passed in the 34 Geo. 3, and intituled "An Act for dividing, allotting, and inclosing certain Moors, Commons, or Waste Lands called, &c., and all the other open Common or Waste Lands in the Manor of East Mark, &c." By that statute the commissioners were authorized to extinguish "all or any part of the right of common in, over, and upon the lands to be enclosed." They were also "authorized and required to set out, ascertain, order, and appoint both public and private roads, &c.," such private ways to be repaired by such persons as the commissioners should order. They were also "authorized and required to set out, allot, inclose, and award to and for" the owner of the soil, "in respect of his right and interest in the said soil in the said moors, commons, or waste lands, such certain parts or parcels thereof,

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

s to the said commissioners should seem meet." The commissioners were in the next place "to divide, set out, and allot, &c., all the residue and remainder of the said moors, &c." unto, or, and amongst the proprietors in respect of their several rights in, on, and upon the same; "and the several and respective allotments so to be assigned, set out, &c.," were to be "in full bar of and compensation for his, her, or their rights or interests in, on, and upon the said moors, &c." "Provided that nothing in this act shall prejudice, lessen, or defeat the right, title, or interest of the said M. H. B. as lord of the said manor, or any future lord or lords of the said manor, in and to the seniorities, royalties, rights, and services belonging thereto; but the said M. H. B. and all future lords of the said manor, shall and may, from time to time, and at all times for ever hereafter hold and enjoy all mines, minerals, goods, and chattels of felons and fugitives, felons of themselves, and persons put in exigent, deodands, waifs, estrays, forfeitures, and all other rights, royalties, jurisdictions, and prominences whatsoever to the said manor appendant or appertaining (other than and except such for which compensation is directed to be made by this act) in as full, ample, and beneficial manner as he and they could or might have held and enjoyed the same in case this act had not been made." "Saving always to the King's most excellent Majesty, his heirs and successors, and to all and every person and persons, bodies politic and corporate, his, her, or their heirs, successors, executors, and administrators (other than and except the several persons to whom any allotment or allotments shall be made, and whose rights are hereby intended to be barred and extinguished), all such estates, rights, titles, interest, claim and demand, which they, any, or every of them, had and enjoyed of, in, to, or out of the said moors, commons, or waste lands so intended to be divided and enclosed or exchanged as aforesaid, at the time of passing this act, or could or might have held and enjoyed in case the same had not been made."

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THE INHABITANTS OF THE
TITHING OF
EAST MARK.
—
Indictment.

The evidence proved that the road had been used as a public road during the whole time since it was set out under the above act. The question was whether there was any evidence of dedication; and it was objected on the part of the defendants that there was no evidence for the jury; that by a clause in the Inclosure Act, the ownership of the soil had been taken out of the lord of the manor, and there being no owner of the soil there could be no dedication. On the other hand, *Poole v. Huskisson* (11 Mee. & W. 827), was cited to show that the soil remained in the lord; and it was contended that at all events there must be an owner, and the user of the road as a public road for fifty years was evidence of a dedication, whoever the owner was. The learned judge who tried the cause was of that opinion; he told the jury that by law there could not be land without an owner; and adopting the direction of the learned judge who tried *Poole v. Huskisson*, he said that the question was whether the owner,

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whoever he was, had consented to such a use of the road as would justify the jury in presuming a dedication; but he also expressed an opinion that the ownership of the soil did remain in the lord of the manor.

Cockburn, Q. C., in the following term, obtained, pursuant to leave reserved, a rule to enter the verdict for the defendant, or for a new trial, on the ground of misdirection, and that the verdict was against the evidence. He conceded that there could not be land without an owner; that the crown would be the owner if there was no other; but that a very different degree of evidence of dedication would be necessary if the crown were the owner of the soil, from that which would be required in the case of a private owner; and that the learned judge had misdirected the jury in telling them that the ownership of the soil remained in the lord of the manor. [He referred to *Barraclough v. Johnson*, 8 Ad. & Ell. 99; *Poole v. Huskisson*, 11 M. & W. 827; and *Rex v. Edmonton*, 1 Moo. & Rob. 24].

Kinglake, Serjt., and *Fitzherbert*, now showed cause.—They contended that the Inclosure Act did not take the ownership of the soil out of the lord, and that in that respect this case was governed by *Poole v. Huskisson*; but that at all events there was no misdirection, because the learned judge had distinctly told the jury that they must be of opinion that the owner, whoever he was, had dedicated. [They referred to *Doe v. Norton*, 11 M. & W. 913].

Cockburn, Q. C., and *Barstow*, contra.—If the soil was in the crown, a very different degree of evidence would be required to prove a dedication, from that which would be considered necessary in another case (*R. v. Edmonton*, 1 Moo. & R. 24); and the opinion of the learned judge, therefore, that the ownership remained in the lord of the manor had an important bearing upon the decision of the jury. [They then contended, upon the construction of the Inclosure Act, that the opinion expressed by the learned judge was wrong.]

LORD DENMAN, C. J.—The law as it has been lately laid down in these cases, leads the courts into very absurd and unimportant inquiries. It is quite unreasonable, if a road has been used as a public road for forty or fifty years, to require those who wish that it should be maintained in a state in which they can continue to use it, to show who was the owner of the soil forty years before; and then, if it belonged to the crown, to raise a doubt as to the dedication. There is no doubt that the crown may dedicate; and is, then, an inquiry to be commenced as to the probability of such dedication, which may arise from the character of the party who has the power to dedicate? Is that reasonable or consistent with common sense, when a town may have been built upon the supposition that the road was a public road? In my opinion the mere fact of enjoyment for a long time ought to be conclusive on any one who is not able to show that there could have been no dedication. The learned judge, however, stopped very much short of this; and his direction was at least perfectly correct.

PATTESON, J.—I think also that there was no misdirection; and that the learned judge was quite right in avoiding any decision as to the question of ownership, for it is very difficult to understand this Inclosure Act. I quite agree with my lord, that cases of this sort are not to be looked at with so great a degree of nicety. There must no doubt be a dedication by the owner; but this is very different from the Abingdon-street case, where there was a lease for ninety-nine years, and therefore it was necessary to show a dedication by the freeholder. No such necessity arises here. If the learned judge had distinctly laid it down that the ownership was still in the lord of the manor, the question might have arisen; but in truth he did not do so. He merely said, whoever is the owner, you must find a dedication by him; and that is clearly right.

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WIGHTMAN, J.—The fallacy of the argument on the part of the defendant arises from the reference to the decision in the Court of Exchequer (in *Poole v. Huskisson*), where an opinion was intimated that the soil was still in the lord of the manor; but the learned judge merely referred to that as showing what might be the case; he left that part of the case in doubt, and only expressed a positive opinion that whoever was the owner, the jury were at liberty to infer from the evidence a dedication to the public, and in that opinion I think he was clearly right.

ERLE, J.—The evidence proved fifty years' uninterrupted use of this road as a public highway; and I am of opinion that the learned judge was quite right in telling the jury that they must have evidence of an intention to dedicate; and that there was evidence from which they would be warranted in drawing that inference. I think he might have said that there was strong evidence.

Rule discharged.

MIDLAND CIRCUIT.

SPRING ASSIZES, 1848.

Warwick, Friday, March 31.

REG. v. THOMAS GOMM.(a)

(Before MAULE, J.)

Embezzlement by agents—Stat. 7 & 8 Geo. 4, c. 29, s. 49—“Entrusting without authority to sell.”

If any chattel or valuable security is entrusted to any broker or agent originally for the purpose of sale, but the authority to sell is afterwards countermanded, and the broker or agent, notwithstanding that countermand, sells the goods in violation of the orders of his principal, such broker or agent may be convicted of misdemeanor, under stat. 7 & 8 Geo. 4, c. 29, s. 49.

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—
Embezzlement.

THE prisoner was indicted under sect. 49 of stat. 7 & 8 Geo. 4, c. 29, which enacts that if any chattel or valuable security, &c. shall be entrusted to any banker, merchant, broker, attorney, or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall in violation of good faith, and contrary to the object or purpose for which such chattel, &c., shall have been entrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, &c., every such offender shall be guilty of a misdemeanor.”

The indictment stated that before the committing of the offence in this count of this indictment hereinafter mentioned, to wit, on the 7th day of January, in the year of our Lord 1847, at the parish of Birmingham, in the county of Warwick, one Thomas Sheldon did entrust to and with Thomas Gomm, late of the parish aforesaid, in the county aforesaid, corn-factor, he the said Thomas Gomm then and there being an agent, to wit, a corn-factor, divers large quantities of certain chattels, to wit, fifty bushels of beans, of great value, to wit, of the value of 20*l.*, of the goods and chattels of the said Thomas Sheldon, for safe custody, and without any authority to sell, negotiate, transfer, or pledge the same. And that the said Thomas Gomm, whilst he was such agent as aforesaid, and whilst he was so entrusted as aforesaid, and whilst the said chattels so were and remained in his possession and custody as aforesaid, and for the purpose aforesaid, to wit, on the 18th of January, in the year aforesaid, with force and arms at the parish aforesaid, in the county aforesaid, unlawfully, fraudulently,

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

and deceitfully, and in violation of good faith, and contrary to the object and purpose for which such goods and chattels had been and were then and there entrusted to and with him as aforesaid, contriving and intending to cheat and defraud the said Thomas Sheldon of his said goods and chattels, did then and there unlawfully sell the same goods and chattels to one Henry Elmore, and did then and there unlawfully convert and dispose of the same to his the said Thomas Gomm's own use and benefit, against the form of the statute in such case made and provided, and against the peace of our lady the Queen her crown and dignity.

REG.
v.
GOMM.
—
Embezzlement.

There was a second count substantially the same as the first.

From the evidence of the prosecutor the following facts appeared:—The prosecutor was a miller near Stratford, the defendant a corn-factor at Birmingham, and they had had dealings together for many years, in the course of which the prosecutor had been in the habit of consigning goods to the prisoner for sale on commission. On the 1st of January, 1847, the prosecutor consigned to defendant fifty bags of beans (Durning) and thirty-eight and a half bags of beans (Stanton) for sale on commission, and they were received by the prisoner in Birmingham on the 4th, and a delivery note signed. On 7th January, the prosecutor verbally ordered the defendant not to sell any of the stock, and on the 14th repeated the same order. On both occasions he went to defendant's warehouse, took samples, and was furnished by the defendant with an account of the stock at the wharf, which included all the beans except six bags (Stanton), which he had sold on the 6th. On the 21st January, the prosecutor sold the whole of the stock in the Birmingham market to a third person, and on the morning of the 22nd went to defendant's warehouse with a delivery order to Holmes; George Gomm, defendant's clerk, then told the prosecutor that twenty bags (Stanton), had been sold to Henry Elmore on the 18th. No account of that sale had been rendered to the defendant.

Miller, for the prisoner, submitted that this case did not fall within the provisions of the statute, inasmuch as it was clear that the goods were not entrusted, which must mean *originally entrusted*, to the defendant for safe custody merely. The defendant was to sell them on commission, that was the regular course of dealing between the parties; and even assuming that the prosecutor had countermanded the authority to sell, and the defendant had understood the order as an absolute prohibition, it never could have been the intention of the Legislature to make any man who might be induced to sell after such an intimation guilty of a misdemeanor. The words ought to be construed strictly, and they pointed only to cases where the goods were originally entrusted to the agent without any authority to sell; but either for safe custody, or for some special purpose, in which case there could be no room for doubt as to the extent of the authority. According to the construction contended for on the other side the authority might be continually shifting; one day it might exist, the next not.

REG.
v.
GOMM.
—
Embezzlement.

Mellor, on the part of the prosecution, argued that the terms of the statute were satisfied and the offence complete. Originally there was authority to sell; but as soon as that authority was withdrawn the goods were entrusted to the prisoner for safe custody merely.

MAULE, J., said that he was of that opinion; and in summing up to the jury told them that if they were satisfied upon the evidence that the original authority to sell had been distinctly countermanded before the sale by the defendant, which was charged in the indictment, they ought to find the prisoner guilty.

Verdict, Guilty.

Three months' imprisonment.

OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES, 1848.

Crown Court, July 26.

(Before PLATT, B.)

REG. v. WILLIAM HARDING FLINT. (a)

Practice—Juror—Challenge.

A challenge of a juror may be allowed after he has been sworn.

REG.
v.
WILLIAM
HARDING
FLINT.
—
Practice.

W. H. COOKE, for the prisoner, having peremptorily challenged one of the jury, another was called from the panel, and took his place and was duly sworn. Immediately afterwards *Cooke* stated that he also objected to the substituted juror, and applied to his lordship to allow another to be challenged.

PLATT, B., after consulting with the clerk of assize, allowed the challenge to be taken, observing that the jury were sworn to try the prisoners whom they should have in charge, and at present no prisoner was in charge.

Huddleston and Woolrych, for the prosecution.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-law.

NORFOLK CIRCUIT.

CAMBRIDGESHIRE SPRING ASSIZES, 1848.

(Before Mr. Justice COLTMAN.)

REG. v. WALLIS. (a)

Larceny—Asportavit—Breaking bulk.

In an indictment for stealing five pints of porter, it appeared that the prisoner was discovered standing by a barrel of porter, out of a hole in which the porter was running into a can on the ground, and that about five pints had run into the can.

Held, that there was a sufficient asportavit proved of the porter in the can.

THE indictment charged the prisoner with stealing five pints of porter, the property of the Eastern Counties Railway Company at Cambridge. The evidence showed that the prisoner had made a hole in the barrel through which the porter flowed into a can on the ground, and that a witness rushed in and snatched up the can while the porter was running into it in the presence of the prisoner.

REG.
v.
WALLIS.
—
Larceny.

At the close of the case for the prosecution,

Naylor, for the prisoner, submitted that there was no sufficient *asportavit*; there was a stealing and taking but no carrying away: (*R. v. Cherry*, 2 East, P. C. 556.) So in a case at Cambridge, where a man indicted for horse-stealing had his hand on the halter for the purpose of leading him away, the judge held that not to be a sufficient *asportavit*. If the prisoner were answering a charge of malicious injury to property, the answer would be that there was a can there for the purpose of *carrying the beer away*.

COLTMAN, J.—I think there was a sufficient *asportavit* of what was run out, but I will reserve the point.

Wells, for the prosecution.

Verdict, Guilty.

(a) Reported by J. B. DASENT, Esq., Barrister-at-Law

WESTERN CIRCUIT.

Exeter, Crown Court.

(Before MR. BARON PLATT.)

Friday, March 24.

REG. v. ANN FISHER. (a)

*Principal and accessory—Severing in challenge.**Where a principal and accessory are indicted together, they will not be allowed to sever in their challenges so as to be tried separately.*

REG.
v.
ANN FISHER.
—
Severing in
Challenge.

ANN FISHER was indicted for having murdered Richard Fisher, by poison, and Mary Hodge, with having aided and assisted her in administering the poison. On being placed at the bar,

Cockburn, Q. C., requested that they might be tried separately. It had been decided not long ago, at Taunton, in the case of *Reg. v. Seeley*, before Mr. Justice Coleridge, that the prisoners could be tried separately, and I now wish to make a similar application. A main portion of the evidence to be used against the principal in this case is a statement alleged to have been made by her whilst in prison, and this statement materially affects the other prisoner, Mary Hodge; she is a married woman, the wife of Richard Hodge, and in order to meet the statement of Ann Fisher, Richard Hodge is an essential and necessary witness. The case of *Reg. v. Seeley* was an indictment against two sisters, for administering poison, and one prisoner had made a statement which had implicated the other. [PLATT, B.—Were they both indicted as principals?] Yes, they were, and as the prisoners were both indicted for the common part they had both taken in one transaction, if their trials could be separated when they were both principals, *à fortiori* the same may be done in this case where one is indicted as principal and the other as accessory, and where the guilt of the two is essentially different. [PLATT, B.—I am quite alive to the injustice that may arise in such a case.] This case has a double and most serious injustice, for the statement this woman is supposed to have made may implicate the other without the least means of resisting it, and an impression may be made against the other prisoner, notwithstanding the direction of the learned judge. I defy any human being wholly to resist such a prejudice; besides, if the trial of Mary Hodge were not put off, an objection would be taken to her husband being made a witness on behalf of Ann Fisher, and he is in a situation to disprove certain facts.

(a) Reported by T. S. COPE, Esq., Barrister-at-Law.

Greenwood.—I think it my duty to object to this course being pursued.

Cockburn, Q. C.—It is entirely in the discretion of the court, and where a prisoner's life is at stake, surely the court will exercise such a discretion on the side of mercy; and I am sure that the court will not enforce the rule beyond the necessary limits, which prohibit a husband from giving evidence on behalf of his wife. [PLATT, B.—It is in the discretion of the court, and there is no necessity for their being tried at the same time, for as all the prisoners at the assizes are supposed to be in one indictment, one might be tried at one assize and the other at the next.]

Greenwood.—I can find no authority for such a course, nor can I find any distinct account of what took place in the case of *Reg. v. Seeley*, but I have heard it stated that in that case the arrangement entered into was by consent. The effect of such an arrangement as this could not merely be to let in the husband, but Mary Hodge might also be made a witness for Ann Fisher, and so when two prisoners are tried together for any offence, they may sever in their challenges, and thus one may have the testimony of the other, the incompetency not commencing until after his conviction.

Cole, amicus curiæ, said that, having taken notes at the trial of *Reg. v. Seeley*, in which two sisters were indicted for poisoning their aunt and father, each of them had made a statement affecting the other. *Mr. Serjeant Kinglake* applied to *Cole-ridge, J.*, at Taunton, that they might be tried separately, and the application was granted.

Cockburn.—I do not see that that case differs in principle from this. Here is a statement made by Mary Hodge, which it is intended to use against Ann Fisher.

PLATT, B.—I will consult with my brother Wightman. On returning he said,—I cannot regard this case otherwise than as that of a principal and an accessory; the indictment charges a principal and accessorial offence, and justice might be defeated by allowing the two offences to be separated, and therefore in exercising the discretion which I have, and fortified as I am by the opinion of the learned judge who is associated with me, and whom I have consulted, I feel that I must refuse the application. As to the case of *Reg. v. Seeley*, the judge may have allowed the challenges to have been severed, but it is an ill practice to do so.

REG.
v.
ANN FISHER.
—
Severing in
Challenge.

NORFOLK CIRCUIT.

NORFOLK SPRING ASSIZES, 1848.

(Before COLTMAN, J.)

REG. v. MEAL. (a)

Burglary—Entry.

On an indictment for burglary, it was proved the legs of the prisoner were seen hanging about a foot from the ground, from a window, and no other part of his body was visible till he jumped down and ran away. Held, that though it appeared there was a hole broken in the window, large enough to admit a man's head and shoulders, there was no evidence to show that there had been any actual entry, no property being lost.

REG.
v.
MEAL.
—
Burglary.

THE prisoner was indicted for burglariously breaking and entering the dwelling-house of Mary Harvey, at Higham, on the 30th of September, with intent to steal therein.

C. Cooper, for the prosecution, proved that at one o'clock in the morning of the 30th of September, a lodger in the house of the prosecutrix was disturbed by the noise of broken glass, and looking out of her window, which was immediately above that of the shop, she saw the legs of a man dangling in the air, and hanging as if out of the shop window, which she could not quite see. After watching a few moments, the witness called out to the man, who then sprang to the ground, and ran off, but not before he was recognized to be the prisoner. When the family was alarmed, the shop window was examined, and it was ascertained that two panes of glass had been broken, the pieces lying inside the frame, and that a quantity of the lead-work was cut away, causing an opening twelve inches long and nine wide, through which a man's head and shoulders might easily be thrust. Nothing, however, was taken from the shop, and none of the witnesses being able to take upon themselves to swear that any part of the man's person had actually been within the shop window,

COLTMAN, J. intimated it to be his opinion that there was no case to go to the jury in support of the indictment, which charged an actual burglary and entry.

C. Cooper submitted that there was abundant evidence of an entry, such as in law constituted a burglary. It was not necessary that more than a portion of the body should be within the house for that purpose; and the fact that the legs only of the man were seen under the circumstances detailed by the witness was all but con-

(a) Reported by J. B. DASENT, Esq. Barrister-at-Law.

clusive that the rest of the body, or a considerable portion of it, had been actually thrust through the window into the room.

Wm. Cooper, for the prisoner, contended that it was incumbent on the counsel for the prosecution to make out his case free from all reasonable doubt. There was nothing here to show that any actual entry had been effected; and that being so, the prisoner was entitled to an acquittal.

COLTMAN, J.—It seems to me that it would be unsafe to call on the jury here to say that there had been any actual entry. No property seems to have been stolen. If any property had been missing, that would have been conclusive evidence of an entry; but the mere circumstance that the glass was broken, and the window cut to an extent large enough to admit a man's head and shoulders, was not enough to constitute an actual entry without positive proof that a portion of the body was within the house. The prisoner ought therefore to be acquitted of the felony and burglary, and another bill for the misdemeanor might be sent up to the grand jury.

The prisoner was thereupon *acquitted*.

On the following day a fresh bill having been found by the grand jury for the misdemeanor,

The prisoner was indicted for unlawfully and feloniously attempting burglariously to break and enter the same house on the same night.

C. Cooper, for the prosecution, proved, by the same evidence, the facts as given above.

Keane, for the prisoner, having elicited, on cross-examination of the lodger, that the prisoner, when first seen by him, could not have been kneeling on the window-sill, and that there was nothing on the outside of the window by which he could have supported his body, while his legs were dangling in the air about a foot from the ground, submitted that there was evidence of the completion of the felony and burglary, and that, consequently, the prisoner could not be convicted of the attempt. There could be no doubt that the house had been broken; the only question was whether there had not been an entry sufficient to constitute the offence of burglary. Now the law held that the intrusion of a man's finger through a broken window, or of any instrument, constituted a burglarious entry, and it could not be doubted but that under the circumstances, some portion of the body which was invisible must have been thrust through the window into the room.

COLTMAN, J. said that the prisoner had been tried and acquitted of the actual burglary and entry, and if he were not guilty of that offence, he was guilty of the attempt to commit it. The evidence adduced on the part of the prosecution left it uncertain whether the prisoner had entered the window by thrusting any portion of his person through the broken pieces, and it would have been most unwise to convict him on uncertain testimony. If he had not accomplished an entry in law, the requisites of which had been cor-

REG.
v.
MEAL.
Burglary.

REG.
v.
MEAL.
—
Burglary.

rectly stated by the learned counsel for the prisoner, it would be the duty of the jury to find him guilty of this charge; but if they should come to the conclusion that the prisoner had actually entered the house, then they ought to acquit him.

The jury, after some deliberation, said,—We find the prisoner guilty of breaking and entering the house.

COLTMAN, J.—Gentlemen, do you think he actually entered the window?

The Jury.—Yes, my Lord. We think he entered with his head and shoulders.

COLTMAN, J.—Very well, gentlemen, then that is a verdict of *Not Guilty* on this charge.

The prisoner was accordingly acquitted.

NORFOLK CIRCUIT.

Cambridge, Crown Court.

Tuesday, March 21.

(Before COLTMAN, J.)

REG. v. SARAH SCARBOROUGH.(a)

Indictment for murder—Name of deceased party—Bastard—Reputation.

In an indictment for the murder of "William Scarborough," it appeared that the deceased was the infant illegitimate son of the prisoner, Sarah Scarborough; that he was sometimes called "William" and "Coley," and was spoken of as "Sarah Scarborough's child," and on one or two occasions as "William Scarborough," in his mother's presence, and there was no proof that he had been baptized.

Held, that there was evidence to go to the jury that the deceased had acquired the name of "William Scarborough" by reputation.

REG.
v.
SCARBOROUGH
—
Indictment—
Name.

THE indictment charged that the prisoner feloniously and maliciously killed William Scarborough, by administering to him a quantity of laudanum.

Couch, for the prosecution, proved that the deceased was the illegitimate son of the prisoner, and that he was four years of age, and that he was generally called "William" or "Coley," after his reputed father; that he was frequently spoken of as "Sarah Scarborough's child," and sometimes his aunt said she might have heard him called "William Scarborough;" but there was no proof that he had ever been baptized.

At the close of the case for the prosecution,

Naylor, for the prisoner, contended that there was not any evidence to go to the jury that the name of the deceased was William

(a) Reported by JOHN B. DASENT, Esq., Barrister-at-Law.

Scarborough, as laid in the indictment. The deceased was an illegitimate child, and as such he could only acquire a name by reputation. The evidence here went to show that the deceased was by some called "William," by others "Coley," and sometimes "Sarah Scarborough's child," but there was no direct proof that he was ever addressed or known as "William Scarborough." The nearest approach to that name was the occasion on which he was spoken of as "Sarah Scarborough's child," but that was not the mode of acquiring a name. It is only a mode of speaking of him behind his back. The name by which he was generally addressed was "William" or "Coley." It is therefore contended that there is no evidence that the deceased had acquired the name of "William Scarborough," as charged in the indictment. He cited *R. v. Stroud* (2 Mood. C. C. 270); and *R. v. Waters* (Ibid. 457).

COLTMAN, J.—I cannot stop the case, for, though it is very slight, I yet think there is some evidence sufficient to go to the jury in support of the charge laid in the indictment, that of killing a person named "William Scarborough." A party may acquire more names than one by reputation, and he may be indifferently described by either in an indictment. Here, at all events, it is established that the deceased, being the bastard child of Sarah Scarborough, had acquired the name of "William," and was sometimes spoken of as Sarah Scarborough's child while in his mother's presence; he was sometimes, though not frequently, spoken of as "William Scarborough," the name laid in the indictment. This, I think, is sufficient evidence to show that the deceased, being Sarah Scarborough's bastard, and being frequently or generally addressed as "William," had also acquired by reputation the name of "William Scarborough."

Naylor then addressed the jury on the merits.

Not guilty.

REG.
v.
SCARBOROUGH
—
Indictment—
Name.

OXFORD CIRCUIT.

Shrewsbury, March 21, 1848.

(Before Mr. Justice PATTESON.)

REG. v. ROBERTS AND JACKSON. (a)

Larceny—Master and servant—Receiver.

A servant entrusted with the care of his master's property, and who subsequently appropriates it to his own use, is guilty of larceny at the time he so disposes of it, and not at any previous time he may have intended to steal it, the principle of animus furandi not applying to the relation of master and servant.

REG.
v.
ROBERTS
AND
JACKSON.
—
Larceny.

THE prisoners were indicted for stealing a quantity of bran and hay. The prisoner Roberts was a servant in the employment of Mr. Pugh, a farmer, and was sent on a journey by his master, on the morning of the 13th of November, with a wagon and horses. The hay and bran, the subject of the indictment, were placed in the wagon by the direction of the prosecutor, for the use of the horses. The prosecutor had lost hay and bran before, and on this occasion caused them to be marked, so as to lead to their identification. When the prisoner had gone about four miles from his master's house, the prisoner Jackson was seen in the road with a cart, and going towards Roberts. The hay and bran were subsequently found in Jackson's cart.

Phillimore, for the prisoner Jackson, submitted that the facts proved made him a receiver, and not a principal, in the felony. The evidence tended to show that Roberts must have entertained a design to steal the bran and hay a considerable time before they were placed in Jackson's cart. The felony by Roberts must be referred to the time the articles were placed in the wagon.

Huddleston, contra.—The position contended for might be correct if Roberts had, contrary to his duty as a servant, taken the bran and hay; but, having a right to take them in his wagon, there was no conversion by him before the delivery to Jackson.

PATTESON, J.—In the case reported, the servant had exceeded his duty. The doctrine of an *animus furandi* has never been applied to cases of master and servant. A servant entrusted with plate may long have had an intention to steal it before he actually removes it, but no case has gone to the extent that such an intention, or *animus furandi*, constituted the larceny.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

PATTESON, J., to the jury.—A man can only be guilty of receiving stolen goods when the goods were stolen previously. In this case the act of stealing was the delivery of the hay to Jackson.

Huddleston for the prosecution.

Greaves for the prisoner Roberts.

Phillimore for Jackson.

REG.
v.
ROBERTS
AND
JACKSON.
—
Larceny.

OXFORD CIRCUIT.

Shrewsbury, March 20, 1848.

(Before Mr. Justice PATTESON.)

REG. v. KELLY AND MALONEY. (a)

Practice—Counsel acting as interpreter.

Semble, a barrister who acts as an interpreter must be sworn.

THE prisoners were indicted for stealing potatoes. Kelly pleaded guilty; Maloney was ignorant of the English language, and could only speak Irish.

P. M'Mahon was about to act as interpreter, and to be sworn accordingly, when

Woolrych, amicus curiæ, submitted that a barrister who acts as an interpreter is not sworn. He had acted as interpreter at the Central Criminal Court in a case of murder, tried before Maule, J., and Rolfe, B., and, after discussion, he was allowed to interpret without being sworn.

PATTESON, J.—I understand that in a case at the Old Bailey, tried before Mr. Serjt. Dowling, he acted as interpreter, and caused the oath to be administered to himself. Counsel are not privileged from taking an oath on giving evidence, and I think the learned gentleman must be sworn.

The oath was not given to *M'Mahon*, the prisoner who pleaded guilty acting as interpreter for his fellow-prisoner.

Cape for the prosecution.

REG.
v.
KELLY AND
MALONEY.
—
Practice.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

NORFOLK CIRCUIT.

BUCKINGHAMSHIRE SPRING ASSIZES, 1848.

Aylesbury, March 8.

(Before Mr. Justice COLTMAN.)

REG. v. BRITTAIN AND SHACKELL. (a)

Conspiracy—Overt act—Proof of common design—High treason.

Where an indictment charges an ordinary conspiracy, it is not necessary to prove a common design between the defendants before proving the acts of each defendant, for the acts of each defendant are only evidence against himself, and may be the only means of establishing the conspiracy. In high treason, the overt act of one is the overt act of all; and therefore, a common design must, in such cases, precede the proof of individual acts.

REG.
v.
BRITTAIN
AND
SHACKELL.
—
Conspiracy—
Treason.

THE prisoners were indicted for having unlawfully conspired together to forge the signature of one William Warrington, to a post-office order for 1*l.* 8*s.* 6*d.*, with intent to defraud Her Majesty the Queen, the Postmaster-General, and Job Rawlins, and others.

Pryme, with whom was *Sanders*, for the prosecution, proved that William Warrington was a member of the Slough branch of the United Patriot's Benefit and Provident Society; that the husband of the prisoner Brittain was, in 1846, the secretary of that branch, and that, according to the rules of the society, every member was entitled to 1*l.* 10*s.* on the birth of a legitimate child. In February, 1846, the secretary of the parent institution in London received an application for 1*l.* 10*s.*, purporting to come from William Warrington, and enclosing a certificate from a midwife, of the fact that on the day before his wife had been delivered by her of a female living child. The writer excused the transmission of his marriage certificate, on the ground that he had been married in the north, and had mislaid it; he, however, requested that the money might be sent to him by a post-office order in a letter addressed to him at "Solomon's Beer-house, Windsor, to be left till called for." The secretary, upon this, forwarded a declaration of the truth of these facts, with directions to be observed in filling it up before a magistrate of the county. In a few days this document was returned filled up; and by return of post, a post-office order was forwarded to the same address, for which a receipt was subsequently returned. In the following year, it was discovered that though William Warrington was a married man, he had never had any issue, and it was further ascertained

(a) Reported by J. B. DASENT, Esq., Barrister-at-Law.

that all the letters and documents purporting to come from him on this subject were forgeries in the handwriting of the female prisoner, who was shown to have called at Solomon's beer-house, and to have obtained his consent to letters being taken in at his house addressed to William Warrington. It also appeared that she had herself called for and taken away the first. With respect to the prisoner Shackell, it appeared that he also was a member of the society, and was appointed secretary at Slough on the dismissal of Brittain, when these circumstances came to light; and it was proposed to be shown that he had taken away the second letter from Solomon's beer-house.

REG.
v.
BRITTAİN
AND
SHACKELL.
—
Conspiracy—
Treason.

Wells, for Shackell, thereupon submitted that, before any evidence of overt acts on the part of Shackell was given, it was incumbent on the counsel for the prosecution to connect him and the other prisoner together in some actual conspiracy and combination of an illegal character. In such a case the proper and usual course was, to lay the foundation for the proofs of the acts of the prisoners by establishing some conspiracy or common design. Here, however, there was not a shadow of an attempt to connect the two prisoners; and whatever might be the character of the evidence about to be offered against Shackell, it ought to be shown to be in furtherance of some foregone conspiracy. It did not even appear that the two prisoners had ever seen each other.

COLTMAN, J.—I do not think it is necessary to prove the conspiracy first. The acts of each prisoner are evidence against himself, and himself alone, till a conspiracy should be proved to exist; and they may show that there was a common design.

Wells.—The course now contended for is clearly indicated as the only proper one in Archbold's *Crim. Pleading*, p. 276, where, on the authority of *R. v. Parsons* (1 Wm. Black. 392), and *Reg. v. Murphy* (8 C. & P. 297), the directions are, "to prove the conspiracy as described in the indictment, and that the defendants were engaged in it, or prove circumstances from which the jury may presume it." "But before you give in evidence the acts of one conspirator against another, you must prove the existence of the conspiracy, that the defendants were members of the same conspiracy, and that the act in question was done in furtherance of the common design." The same learned author again, at p. 491, under the head of High Treason, says, "When a conspiracy is laid as an overt act, the acts of any of the conspirators in furtherance of the common design may be given in evidence against all: (*Hardy's case*, 1 East, P. C. 70)." He also adds, "In such a case, the first thing to be proved is the conspiracy: secondly, evidence must be given to connect the defendant with it: and, lastly, if it be intended to give in evidence against the defendant the acts of any other person, you must show that such person was also a member of the same conspiracy, and that the act was done in furtherance of the common design: (*Re Sydney*, 3 State Trials, 798)." On these authorities it was contended that the acts of

REG.
v.
BRITTAİN
AND
SHACKELL.

Conspiracy—
Treason.

Brittain could not properly be received as against Shackell, and that evidence cannot be gone into as to his own acts in the absence of all proof to show that they were both actuated by a common design.

Pryme.—It must be frequently impossible to do what is now required on the part of the prosecution. The acts of the prisoners may be the only means of proving their conspiracy. He was stopped by

COLTMAN, J.—In an ordinary case of conspiracy, such as this, I do not think that it is incumbent on the counsel for the prosecution to prove an actual conspiracy in the first instance, and then to go on to fix each defendant by his own acts. The course contended for by Mr. *Wells* arises out of the doctrine peculiar to high treason, where the overt act of one prisoner is the overt act of all, after a common design or conspiracy has been established. In such charges it is essential to prove first that a conspiracy exists; but there the act of each prisoner is evidence against himself alone. The acts brought home to Brittain do not affect the prisoner Shackell, nor will his acts affect her. Unless the acts so proved are shown to have emanated from one common design, such as that laid in the indictment, the case for the prosecution must fail. I shall therefore receive the proposed proof of Shackell's interference in the second letter.

Pryme then proved that while the letter was lying at Solomon's house, the prisoner Shackell went there, and on the landlord drawing public attention to the circumstance, and requesting that some one would tell Warrington that there was a letter there for him, Shackell took it, and opening it, said, "Oh, I see, it is about the society's business. I am the secretary, and will deliver it to Warrington myself." On this he took away the letter, which contained the post-office order; but no evidence was given to show by whom the money was obtained, the post-master being ignorant of anything beyond the fact that the money was paid in the course of business to some one who presented the order.

Wells thereupon submitted that there was no evidence to go to the jury against the prisoner to support the charge of conspiracy. The prisoner Brittain had already been tried and convicted of forging the signature, so that it was a matter of indifference to her; but as regarded Shackell, who had nothing whatever to do with the actual forgery, but was now indicted with her for conspiring to defraud various parties, all the facts connected with the forgery were quite immaterial, and went for nothing. All that he had done was to interfere somewhat unnecessarily, and to offer to deliver the letter. What had become of it no one knew.

COLTMAN, J.—I cannot say that there is no evidence, though what there is certainly is very slight. The prisoner had no business to interfere with the letter, unless he was acting with Brittain. There is no proof of what became of the letter, certainly; but the contents are shown to have got into Brittain's hand, for she forged Warrington's name to it. These circumstances are

sufficient to go to the jury to prove a common design; and then Shackell told a falsehood when he said that he was secretary. I cannot withdraw the case from the jury.

Wells then addressed the jury for Shackell, and ultimately they returned a verdict of

Not guilty.

REG.
v.
BRETTAIN
AND
SHACKELL.

HOME CIRCUIT.

ESSEX SPRING ASSIZES, 1848.

(Before LORD DENMAN, C. J.)

REG. v. BRETT AND PARISH. (a)

REG. v. WHITE AND OTHERS.

Practice—Trial.

By consent, a jury may be charged with the trial of two or more indictments at the same time, even though the indictments be for different offences, and against different persons, where the circumstances upon which the indictments are founded form part of the same transaction.

GEORGE BRETT was indicted for a rape upon Mary Hockley, upon the 27th of October, 1847, and John Parish was indicted in a separate indictment for an assault upon the same prosecutrix, upon the same day. It appeared by the depositions, which had been taken against the two prisoners jointly, that the alleged assault was committed at the same time as the alleged rape, and that they both formed parts of the same transaction.

Glyn, for the prosecution, suggested that it would be convenient that the two prisoners should be tried together upon the respective indictments.

T. Chambers, who appeared for both prisoners, had no objection to such a course, if it could legally be adopted.

LORD DENMAN, C. J.—I see no objection to the jury being charged with both inquiries at the same time, where the parties consent to such a mode of proceeding.

The prisoners were accordingly tried together.

Verdict, Not Guilty.

William White and William Jessup were charged by one indictment with highway robbery, committed upon William Carter, upon the 27th of October, 1847, and Charles Moss was charged by the same indictment, first, with harbouring the other two prisoners after the commission of the felony: and, secondly, with receiving a

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v.
WHITE AND
OTHERS.

(a) Reported by P. PARNELL, Esq. Barrister-at-Law.

REG.
v.
WHITE AND
OTHERS.
Practice.

watch, the property of which Carter was robbed, knowing it to have been stolen. In a second indictment, James Woor was charged with receiving the watch, the property of Carter, knowing the same to have been stolen. In this case

LORD DENMAN, C. J. suggested, that it would be convenient to try both indictments at once, and the prisoners consenting, they were so tried accordingly.

Cobbett, for the prosecution.

Johnson, for the prisoner Woor.

Creasy, for the prisoner Moss.

White and Jessup were undefended.

Verdict, Guilty. Sentence, White, Jessup, and Woor, to be transported for seven years; Moss to be imprisoned and kept to hard labour for nine calendar months.

HOME CIRCUIT.

ESSEX SPRING ASSIZES, 1848.

(Before LORD DENMAN, C. J.)

REG. v. ANN MARIA LEE. (a)

Forgery—Complete instrument.

The cheques of a provident society having different branches were drawn in the name of the society, and signed by the chairman and three of the committee of any branch of the society. They were then countersigned by the clerk of the whole society. The bankers did not know the names or signatures of the chairman or committee-men, but relied upon the counter signature of the clerk as a voucher for their authenticity.

Held, that a forgery of the signatures of the chairman and three members of the committee of a branch of the society, by means of which the genuine signature of the clerk was obtained, was a forgery of a warrant or order for the payment of money.

REG.
v.
A. M. LEE.
Forgery.

THE prisoner was indicted for forging a certain warrant for the payment of money, which was set out in the indictment, and which purported to be a cheque upon Messrs. Sparrow and Co. bankers, at Chelmsford, drawn in the name of the Essex Provident Society, and signed by the chairman and three members of the Dunmow sub-committee of the society. In other counts the instrument was described as an order for the payment of money.

It appeared that the Essex Provident Society had various branches in different parts of the county, and among others a branch at Dunmow. By the rules of the society all cheques drawn upon

(a) Reported by P. PARNELL, Esq. Barrister-at-Law.

the bankers of the society (Messrs. Sparrow), on account of the society, were to be signed by the chairman and three members of a sub-committee (that is, a committee for some branch of the society), and were then to be countersigned by a person named Bassenwhite, the clerk of the society, who resided at Chelmsford, where the bankers of the society carried on their business.

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v.
A. M. LEE.
Forgery.

The prisoner brought the cheque alleged to be forged, bearing four signatures, which purported to be those of the chairman and three members of the Dunmow sub-committee, to Mr. Bassenwhite, the clerk, and he, supposing the signatures to be genuine, countersigned the cheque in the usual manner. The four signatures were forgeries. The cashier of the bank, who cashed the cheque, stated that he knew nothing of the four signatures last-mentioned, or of the persons whose signatures they purported to be. The bankers, he said, did not know who the members of the sub-committee were, but relied upon the signature of Mr. Bassenwhite as authenticating the cheque. And he added, that a cheque signed by the members of the committee, but not countersigned by the clerk, would not be paid.

Parry, for the prisoner, upon these facts contended that the indictment could not be sustained. There was no complete instrument forged. Without the name of Bassenwhite the instrument was informal and had no validity. It was at the utmost a mere commencement to commit forgery. The subsequent addition of Bassenwhite's signature made no difference, as that signature was genuine. [He referred to 2 Russ. on Crimes, 352; *R. v. Richards*, R. & R. 193; *R. v. Randall*, ib. 195.]

Badeley and *Hawkins*, for the prosecution.—The name of Bassenwhite was no part of the instrument itself. It was a complete order or warrant without his signature; a valid order as far as the prisoner could make it so. The signature of Bassenwhite is merely a guarantee for the genuineness of the other signatures, upon the security of which the society and the bankers agree to act. It makes no difference that that guarantee is given upon the same piece of paper as the order.

LORD DENMAN, C. J.—I think the point is very clear, and at present am not disposed to reserve it. If she has forged these signatures, I think the indictment is made out.

The case then proceeded.

Verdict, Guilty.

Sentence, Twelve months' imprisonment and hard labour.

CENTRAL CRIMINAL COURT.

MARCH SESSION, 1848.

Saturday, March 4.

(Before Mr. Justice ERLE.)

REG. v. EDWARDS, UNDERWOOD, AND EDWARDS. (a)

*Practice—Right of counsel for the prosecution to decline calling all the witnesses on the back of the bill.**It is in general a matter entirely within the discretion of counsel for the prosecution whether all the witnesses at the back of the bill should be called on behalf of the crown or not; and although the judge has the power to interfere, he will only exercise it in extreme cases.*

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v.
EDWARDS,
UNDERWOOD,
AND
EDWARDS.
—
Practice.

THE prisoners were indicted for forgery, and the case for the prosecution being closed without all the witnesses on the back of the bill having been called,

Parry, for the prisoners, submitted that it was the duty of the prosecutor to call them all, that he might have an opportunity of cross-examining them. One witness had given evidence before the magistrate, on the part of the prosecution; she had been since taken from all communication with the prisoners; she had been taken before the grand jury, and yet it was now sought to exclude her testimony, or to compel the prisoner to call her. He quoted *R. v. Carpenter*, 1 Cox's Crim. Law Cas. 72, in which Alderson, B. said—"Every witness, whose depositions are taken by the magistrate and who is under recognizance to appear, should go before the grand jury, and the name should be indorsed on the bill, otherwise great injustice may be done to prisoners. A prisoner relies on certain witnesses being produced by the prosecution, and whose deposition he is entitled to. He has a right to their testimony, if it tells in his favour. It is the duty of the prosecution to put the witnesses into the box." In *R. v. Bailey*, 2 Cox's Crim. Law Cas. 191, also, it was held that the prisoner might insist on all the witnesses at the back of the bill being called by the prosecution, that they might be cross-examined by the prisoner. There Pollock, C. B. doubted at first whether he ought so to rule, but, on consulting Mr. Justice Coleridge, he acted on the principle now contended for. In *R. v. Holden*, 8 C. & P. 606, Mr. Justice Patteson uses these words after a discussion on the same point: "On a trial for murder, every person who was present at the transaction ought to be called; and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter."

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

Clarkson (with whom was Sir *Francis Knowles*), for the prosecution, resisted the application, and contended that it was a matter for the discretion of the counsel for the crown whether any particular witness should be examined or not. He quoted a case of *R. v. Thacker and Ringrose*, tried at the July Session of the Central Criminal Court in the year 1847, and in the sessions papers of that Court he found these observations:—"Mr. Parry, understanding that a Mr. Partridge (whose name was at the back of the bill) was in attendance, was desirous of putting a question to him. The Solicitor-General expressed his readiness to call him; but the Court was of opinion that as his evidence was not required for the prosecution it should be left to the prisoner's counsel to call him as a witness, the judges having come to a decision that counsel for the prosecution were not required to call all the witnesses whose names appeared on the bill, although bound to have them in attendance." There the Court itself interposed, although the Solicitor-General was willing that the witness should be called. The learned counsel further said that he had thought it right to have the witness in attendance, but should decline to call her unless compelled.

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v.
EDWARDS,
UNDERWOOD,
AND
EDWARDS.
—
Practice.

ERLE, J.—My own impression is clear, and I believe a majority of the judges have distinctly decided that the counsel for the prosecution is not bound to call all the witnesses at the back of the bill. He is a minister of public justice, and is called upon to lay such facts before the jury as he thinks the interests of justice demand. I recollect a remarkable case of murder (*Reg. v. Belaney*), in which I was counsel for the prisoner, in prosecuting which three or four witnesses, who had been before the grand jury, were not called. It was most material for the prisoner that he should not be obliged to call them, but the learned judges who tried that case resisted every effort I made to induce them to interfere with the discretion of the prosecuting counsel; and in the end I was compelled to make them my witnesses. If Mr. Clarkson tells me that he does not think that justice would be advanced by his calling the witness, I cannot interfere.

Parry then submitted that though the counsel for the prosecution might not be compellable to call the witness, it was clearly within the power of the judge to do so, and requested his Lordship to exercise his discretion in this instance. It had been done in *Reg. v. Holden*, above quoted.

ERLE, J.—No; I do not think I ought to do so. There are, no doubt, cases in which a judge might think it a matter of justice so to interfere; but, generally speaking, we ought to be careful not to overrule the discretion of counsel, who are, of course, more fully aware of the facts of the case than we can be.

OXFORD CIRCUIT.

Shrewsbury, March 22, 1848.

(Before Mr. Justice PATTESON.)

REG. v. TAYLOR AND MORRALL. (a)

Dying declaration.

*Where the deceased having said that he thought he should die, made a statement, and two or three days afterwards expressed his belief that he should recover, and he lived some days after that,
Held, that the statement was inadmissible.*

REG.
v.
TAYLOR
AND
MORRALL.

Dying Declaration.

THE prisoners were indicted for the murder of Francis Coningham, at Wellington, in the county of Salop, on the 24th of December, 1847.

It appeared in evidence that the deceased was stabbed on the 24th of December. On the 6th of January he had the last rites of the Roman Catholic Church administered to him. Upon the same or the next day, the surgeon, at the request of a magistrate, put the question to the deceased, whether he had any hope of recovering. The deceased said "I think I shall die." He then made a statement. The surgeon stated that at the time he considered the deceased to be in a most dangerous state. About two or three days afterwards the deceased expressed a belief that he should recover. He died on the 12th of January. Upon these facts,

Godson, Q. C., for the prosecution, proposed to give in evidence the statement made by the deceased.

Phillimore, for Morrall, submitted that the evidence was not receivable. The question in all these cases is what was the sober and lasting opinion in the mind of the deceased. Here he subsequently expresses a hope and expectation of recovery.

PATTESON, J.—I think the statement cannot be given in evidence. The deceased first says he thinks he shall not recover, and two or three days afterwards he expresses a hope. For obvious reasons the doctor would not tell his patient that there was no hope. I think it would be hardly right to admit a declaration made under such circumstances.

Godson, Q. C., for the prosecution.

Phillimore and Kenealey for Morrall.

Huddleston for Taylor.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

OXFORD CIRCUIT.

Gloucester, March 31, 1848.

(Before Mr. Justice CRESSWELL.)

REG. v. JEFFRIES AND BRYANT. (a)

Larceny—Principal and accessory.

If A. unlocks a door of a room of which he has the key, in order to allow B. to commit a larceny in it, and A. then goes away, and B., in his absence, enters the room and removes articles out of it, A. is not a principal in the larceny.

THE prisoners were indicted for larceny in a dwelling-house. It appeared that Jeffries was clerk to one Whittock the prosecutor, who was a coal dealer. The prosecutor's money chest was kept in a room adjoining the office; and of the door of this room the prisoner Jeffries had a key. On the night of the larceny he was proved to have unlocked the door and then gone away. About twenty minutes afterwards the prisoner Bryant came to the room and removed the money chest. It was attempted to be shown, on the part of the prisoner Jeffries, that he was three quarters of a mile from the prosecutor's premises at the time Bryant was there.

REG.
v.
JEFFRIES
AND
BRYANT.
—
Larceny.

CRESSWELL, J., told the jury that where one person opens the door of a house which contains the articles stolen, and then goes away, and another in his absence, but acting in concert with him, enters the house and commits the larceny, the one who opens the door is not guilty as a principal in the act.

Greaves, for the prosecution, submitted that Jeffries was guilty of a joint larceny, although he was not actually present at the time of the removal by Bryant. In the case of burglary, where the breaking is in one night, and the entry the next night, a person present at the breaking, though not present at the entering, is, in law, guilty of the whole offence: (*Rex v. Jordan*, 7 C. & P. 432.)

CRESSWELL, J., said he would consult Mr. Justice Patteson, sitting in the Nisi Prius Court. On his return, he said Mr. Justice Patteson agreed with him, and entertained no doubt on the point; and accordingly,

CRESSWELL, J., directed the jury, if they believed that Jeffries was not present assisting Bryant at the time of the removal of the chest, to acquit him.

Greaves for the prosecution.

W. H. Cooke for the prisoners.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES, 1848.

July 28.

(Before ROLFE, B.)

REG. v. REUBEN WHITEHOUSE. (a)

Perjury—Indictment—Assignment of perjury.

Where an indictment alleged that R. W. falsely swore that "he was in the bar of the house of J. B., on the 15th day of February last, from between the hours of six o'clock and seven o'clock in the evening of the said last-mentioned day, until nine o'clock in the evening of the said last-mentioned day, and that he the said R. W. did not then and there play at any game of cards at all:"

Held, that perjury was not sufficiently assigned by an averment that "the said R. W. did then and there (to wit) in the said bar of the said house and premises of the said J. B. on the said 15th day of February last, and between the hours of six o'clock in the evening of the said last-mentioned day, and eight o'clock in the evening of the said last-mentioned day, play at a certain game of cards," &c.

REG.
v.
REUBEN
WHITEHOUSE.
Perjury.

THE defendant was indicted for perjury alleged to have been committed by him, upon the hearing by magistrates in petty sessions of an information against one John Bailey, the keeper of a public house, for permitting cards to be played at his house on the 15th of February, 1848.

The indictment alleged that it was material, on the hearing of this information, to prove that cards were played in the bar of the public-house, between the hours of six o'clock and eight o'clock in the evening of the said 15th day of February; that the defendant came before the justices and was duly sworn, &c.

The indictment then proceeded as follows:—"The said Reuben Whitehouse did, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said Right Honourable William Earl of Dartmouth and J. E. Piercy, Esq., justices aforesaid, depose and swear, amongst other things, in substance and to the effect following, (that is to say) that he the said Reuben Whitehouse was in the bar of the said house and premises of the said John Bailey on the said 15th day of February last, from between the hours of six o'clock and seven o'clock in the evening of the said last-mentioned day, until nine o'clock in the evening of the said last-mentioned day, and that he the said Reuben Whitehouse did not then and there play at any

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

game of cards at all, and that no cards or game of cards at all were or was, during all the said last-mentioned time, or between the hours aforesaid, played therein. Whereas, in truth and in fact, the said Reuben Whitehouse did then and there, to wit, in the said bar of the said house and premises of the said John Bailey, on the said 15th day of February last, and between the hours of six o'clock in the evening of the said last-mentioned day, and eight o'clock in the evening of the said last-mentioned day, play at a certain game of cards with other persons, to the jurors aforesaid, as yet unknown. And whereas, in truth and in fact, cards were then and there, to wit, in the said house and premises last aforesaid, and on the day and between the hours last aforesaid, played."

REG.
v.
REUBEN
WHITEHOUSE.
Perjury.

The jury having found the defendant *guilty*,

Rupert Kettle moved in arrest of judgment, on the ground that the facts alleged in the indictment to have been sworn were quite consistent with the subsequent averment that the defendant played between six and eight.

Carrington and *P. M'Mahon*, for the prosecution, contended that after verdict the defendant must be considered as having sworn that he did not play at any time while he was in the house on the occasion in question.

ROLFE, B.—The indictment is bad, as it seems to me. The defendant may have played at five minutes past six, and yet not have played from between six and seven until nine; for the words "from between six and seven" may be any time short of seven, five minutes or five seconds to that hour. The indictment cannot be read as averring that the defendant swore that he did not play at any time during that evening, but merely that he did not play at a particular period of the evening, namely, from some period before seven until nine. That might be perfectly true, and yet he may have played between six and seven, and so may have played as is assigned in the indictment between six and eight.

The defendant was discharged.

OXFORD CIRCUIT.

SHREWSBURY SUMMER ASSIZES, 1848.

Crown Court, July 31.

(Before ROLFE, B.)

REG. v. JAMES PHILLIPS. (a)

Forgery—Evidence of guilty knowledge.

Quære—On an indictment for uttering a forged acquittance, not being an instrument of ordinary transmission from hand to hand, can similar instruments, uttered by the prisoner on other occasions, be given in evidence to prove a guilty knowledge?

REG.
v.
JAMES
PHILLIPS.
—
Forgery.

THE prisoner was indicted for uttering on the 10th of May last, a certain forged acquittance for money, knowing the same to be forged, with intent to defraud one Richard Thomas.

Mr. Richard Thomas, the prosecutor, a dealer in cattle, had employed the prisoner in the month of April to drive some cattle for him from Shropshire into one of the Midland counties. The prosecutor had on former occasions employed the prisoner in the same way, and was in the habit of paying him the expenses attendant upon the removal of the cattle, the prisoner producing vouchers for the payments.

On the occasion in question, the prisoner, on his return from the journey on the 10th of May, claimed as part of his expenses, among other sums, the sum of 9s. for hay for the cattle at a place called North Kilworth. He produced the following acquittance:

“April 17, Swan Inn, North Kilworth, 2 cwt. of hay, 9s.

Paid, John Brown.”

The prosecutor paid the amount to the prisoner, but subsequently ascertained that the latter had not paid any such sum, or had been at the Inn at North Kilworth.

Huddleston, for the prosecution, was about to prove that the prisoner had uttered a similar forged acquittance to the prosecutor on the 11th of March previously, for money alleged to have been paid to the landlord of the Chandos Arms Inn, at Knighton in Radnorshire; upon which,

Phillimore, for the prisoner, objected to this evidence. It was only in cases of forged coin or bank notes, or other instruments which a party might very innocently transmit from hand to hand, that evidence was allowed to be given of the uttering of other coin or notes. In this case, it was impossible, under the circumstances, that if the prisoner really uttered the acquittance, he could be ignorant of the fact that it was a forgery, and therefore the proof

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

of the uttering of other similar acquittances could not assist the jury in determining the guilt or innocence of the prisoner, but was only calculated to create a prejudice in their minds unfavourable to him. Here the one transaction was in no way connected with the other, and an interval of two months occurred between the one uttering and the other. If the uttering in *March* could be given in evidence to support an uttering in *May*, so might an uttering twenty years before; which would be against the established principle that a prisoner was not to be prejudiced by having one distinct offence mixed up with another. The learned counsel referred to a decision of Mr. Baron Platt at Stafford, the week before, when, on an indictment for uttering a forged order for goods, he refused to receive evidence of a similar uttering on the previous day. (a)

REG.
v.
JAMES
PHILLIPS.
—
Forgery.

Huddleston, contra, referred to *Reg. v. Clarke and Bradbury*, at the Central Criminal Court, where, after argument, Lord Denman had admitted such evidence.

ROLFE, B.—I am of opinion that the evidence is clearly admissible, and have so ruled in a case at Worcester, on the present circuit. (b) The observations of Mr. Phillimore, that such evidence is in this particular case of no avail, are of great force, for the presumption that the prisoner did not know that the instrument which he is charged with uttering was forged, is extremely slight. But it is just possible that a jury might suppose him ignorant of the forgery, and although the evidence may be of no great weight, yet the principle which admits such evidence is the same. Even in the case supposed by the learned counsel of an interval of twenty years between the utterings, the evidence would be receivable in principle, but I should in that case direct the jury to pay no attention to it. In consequence, however, of the reported decision of my brother Platt, I shall mention the case to him.

His Lordship retired to confer with Baron Platt, who was sitting at Nisi Prius. Upon his return,

ROLFE, B. said, I find that my brother Platt's opinion is still the same as expressed at Stafford. I shall therefore receive the evidence, but reserve the question for the judges. I yield to the authority, and not to the reasoning. My opinion is that the evidence is admissible.

Huddleston did not, however, give the proposed evidence. The prisoner was convicted.

(a) *Reg. v. Jackson & others*, Stafford Summer Assizes, 1848.—The order or request in this case was for 12 quarts of ale, purporting to be issued by one William Marsh, a sub-contractor on a railway, in favour of the prisoners, who were "navies" working on the line. *Huddleston*, for the prosecution, proposed to give in evidence a similar order uttered the day before; but *Woolrych*, for the prisoner, objected, and PLATT, B. peremptorily refused, to admit the evidence, observing that there was a wide distinction between this case and that of forged notes and coin.

(b) The case referred to by his lordship was *Reg. v. Edwards*.—The uttering in that case was a warrant or shop-ticket for the delivery of goods, and his lordship received evidence of an uttering of a similar order three days previously to the one that was the subject of the indictment. Best for the prosecution, *Hodgson* for the prisoner.

OXFORD CIRCUIT.

HEREFORD SUMMER ASSIZES, 1848.

Crown Court, August 4.

(Before PLATT, B.)

REG. v. WILLIAM HENRY HYDE. (a)

Evidence—Deposition of party since deceased.

Quære.—Is the deposition of a witness before the committing magistrates, where the attorney for the prisoner abstains from asking any question, in consequence of the witness being too ill to hear any further examination, sufficiently complete to render it evidence against the prisoner where the witness dies before the trial?

REG.
v.
WILLIAM
HENRY HYDE.
—
Evidence.

THE prisoner was indicted for an assault upon Esther Smith, a child under the age of ten years, with intent to commit a rape. At the time the prisoner was taken into custody, which was several months after the alleged offence, the prosecutrix was in a rapid decline. She was examined before the committing magistrates, and stated the facts of the assault upon her by the prisoner very concisely. Upon a question being put to her by the clerk to the magistrates who conducted the examination, she said "I can't answer, I can't answer," and was evidently in a sinking state. Down to this period she had answered the questions satisfactorily. The clerk to the magistrates said he should not ask any further questions. An observation was made by the clerk or magistrates, that Mr. Badham, the prisoner's attorney, who was present, must have an opportunity of cross-examining the witness. The attorney said "I shall decline putting any question, the child is evidently not in a fit state to answer." The deposition was then completed in form, by the witness putting her mark to it. There was no subsequent examination, and the child died soon afterwards. These facts having been elicited from the clerk to the magistrates, who was called to prove the deposition,

Skinner, for the prisoner, objected to the reception of the deposition. It was incomplete. The examination was not concluded, in consequence of the inability of the child to bear further questioning. The inquiry in chief was not exhausted, but was abandoned. [PLATT, B.—Is the fact, that the child was unable to bear a further examination, a reason for shutting out the deposition?] The cause of the impediment is immaterial. If the prisoner never had an opportunity of testing the accuracy of the witness the statement cannot be received. [PLATT, B.—Surely

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

an attorney cannot shut out a deposition by abstaining from cross-examination.] Can it be said that under these circumstances the whole truth was elicited where there was no opportunity of testing it? The attorney abstained from motives of humanity to the witness. The principle is the same when the prisoner is absent as when he has no opportunity of examining the witness. Here the inquiry is unfinished. It is proceeded with until the powers of the child are exhausted. What good could arise from the cross-examination of a child in that state?

W. H. Cooke, for the prosecution.—The deposition was duly taken; the prisoner and his attorney were present. The attorney refuses to cross-examine; whether for a good, bad, or indifferent reason, is immaterial. [PLATT, B.—The mode of trying the point is this:—If the child had died the moment she had put her mark, could the deposition be received? Mr. Badham says he declined because the witness was not in a fit state to be examined.] The attorney did not ask for delay or another opportunity. The deposition may, however, be received as a dying declaration.

A witness was then called to prove the state of the child at the time, but failed to show that she was under an impression that she should not recover. The deposition therefore could not be received as a dying declaration.

PLATT, B.—I cannot shut my eyes to this fact, that a cross-examination qualifies an examination in chief; without it, the deposition is not the whole of the statement of the witness. The deposition is all the witness says at the time; here she would have added more, but was unable. The attorney, however, did not apply for an adjournment. I incline to think that the deposition cannot be received in evidence. I shall admit it now, and reserve the point for the judges.

The prisoner was, however, acquitted.

REG.
v.
WILLIAM
HENRY HYDE.
Evidence.

NORTHERN CIRCUIT.

York, Wednesday, March 15.

(Before ROLFE, B.)

REG. v. CHAMBERS. (a)

*Evidence of another felony—Statement of prisoner.**Evidence of a distinct felony may be given in re-examination where it will serve to explain an apparently contradictory fact elicited by cross-examination.**A statement of a prisoner is admissible in evidence, although he was previously told that whatever he said "would be used against him."*

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—
Evidence of
another Felony
—Prisoner's
Statement.

THE prisoner was indicted for having committed a rape upon the person of his grand-daughter, Isabella Chambers, a child under the age of ten years. It having appeared on cross-examination of the little girl, Isabella Chambers, that the act for which the prisoner was indicted had not caused her any pain,

Hill (*Farrer* with him), on re-examination, proposed to ask the witness whether her grand-father had done the same thing to her on previous occasions.

Price, for the prisoner, objected to this question as leading to the admission of evidence which would support another indictment for a distinct felony.

ROLFE, B., admitted the evidence as tending to explain the circumstance that the act in question had not occasioned any pain.

Hill afterwards proposed to give evidence of a statement which was made by the prisoner to a police officer.

Price objected, and on the authority of two or three rulings admitted to be in point, contended that evidence could not be given of the statement, inasmuch as the prisoner had been told, previously to his making it, that whatever he said *would be used against him*.

Hill said there were other rulings to the contrary.

ROLFE, B., considering that the cases cited in support of the objection had been overruled, held the statement admissible, and received the evidence.

(a) Reported by T. E. KIME, Esq., Barrister-at-Law.

QUEEN'S BENCH.

EASTER TERM, 1848.

May 8th and 10th.

THE QUEEN v. JOHN MITCHEL.

SAME v. SAME.

Seditious libel—Information ex officio—Practice—Pleading—Autrefois arraign—Pendency of an indictment for same offence—Nolle prosequi—Plea in abatement—Demurrer to concluding in bar—Replication to like plea introducing new matter, conclusion of—Judgment of respondeat ouster notwithstanding prayer of final judgment—Discontinuance.

To an ex officio information filed by the Attorney-General against J. M., for the publication of a seditious and defamatory libel, the defendant pleaded that an indictment had been found against him in the Queen's Bench for the publication of a seditious and defamatory libel, upon which he was duly arraigned, and such proceedings were thereupon had; that afterwards the Attorney-General came into court and said that he would not further prosecute the said J. M., and that the said J. M. should go thereof without day, and that the said J. M. and the said J. M. so indicted and arraigned, were one and the same person, and not other and different persons; and that the offences of which he the said J. M. was so indicted and arraigned as aforesaid, and the offences in the said information specified were one and the same; and that, according to the laws and customs of this realm, the said J. M. ought to be free and exempt, under the circumstances aforesaid, from being compelled to answer for the said supposed offences, in the information specified, before any judge or minister of our lady the Queen, or any other judge in any court whatsoever, except upon indictment found, or presentment made, on the oaths of twelve men of the body of the county in which the said supposed offences were committed; concluding with a verification, and praying judgment if the court would or ought to take cognizance of the information aforesaid, and that he might be dismissed and discharged, and so forth.

To this plea the Attorney-General demurred, and prayed "judgment, and that the said J. M. might be convicted of the premises above charged upon him in and by the said information."

To another information for a similar offence the defendant pleaded, that theretofore, &c., an indictment was found in the Queen's Bench against one J. M., for the publication of a seditious libel, and that he and the said J. M. so indicted were one and the same person, and not other and different persons, and that the said several supposed offences in the several counts of the indictment, and the several offences in the several counts in the said information were one and the same, and that he was duly arraigned on the said indictment, and that it was still depending against him in the court of our lady the Queen; concluding with a verification,

and praying "judgment of the said information, and that he may not be compelled to answer thereto."

Replication to this plea; that after the arraignment of the said J. M., upon the indictment in the plea mentioned, and before the exhibiting of the said information, the said J. M. pleaded in abatement of the indictment, that one of the jurors by whom the bill was found was disqualified; and that the said Attorney-General, after the pleading the said plea, and before the exhibiting of the said information, came into court, and said that he would not further prosecute the said J. M. on the said indictment, and thereupon it was considered and adjudged by the court against him the said J. M., upon the said indictment, as by the record and proceedings thereof remaining in the said court more fully appears; concluding with a verification, and praying "judgment and that the said J. M. may be convicted of the premises in the said information specified."

To this replication the defendant demurred, praying "judgment of the said replication, and that he the said J. M. may not be compelled to answer the same."

Held, that both the pleas were bad: that an Attorney-General is at liberty, after having entered a nolle prosequi on an indictment, to file an *ex officio* information for the same offence; and that in prosecutions for crimes the pendency of an indictment or information is not a good plea to an information, subsequently filed against the same party for the same offence.

Semble, that the observations in 2 Hawkins P. C. lib. 2, ch. 34, s. 1, in favour of the validity of such pleas to informations, apply only to informations *qui tam*.

Semble, also, that the entry of a nolle prosequi puts an end to an indictment.

Although the prosecutor having demurred to a plea in abatement, concluded in bar praying final judgment,

Held, that the court were not precluded thereby, but were bound to give that judgment which was right on the whole record.

Where a replication to a plea in abatement introduces new matter, upon which issue may be taken, the prosecutor is entitled to pray final judgment.

Quære, whether there can be, on the part of the crown, a discontinuance in pleading?

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TWO indictments having been found in this court against the defendant, charging him with the publication of seditious and defamatory libels in a paper called *The United Irishman*, he pleaded in abatement (see 11 Law Times, 112), that one of the grand jurors who found the bill was disqualified, being a member of the council of the borough of the city of Dublin (see stat. 3 & 4 Vict. c. 108, s. 180, corresponding to 5 & 6 Will. 4, c. 76, s. 122, Engl.); whereupon the Attorney-General entered a nolle prosequi on each, and filed *ex officio* two separate informations for the same publications, charging one of them in the first information and another in the second. To the first of these informations (for the proceedings upon the second, see p. 106, *post*) the defendant put in the following plea:—

"And the said John Mitchel, in his own proper person, cometh

into court here and says, that the court of our lady the Queen here ought not to take cognizance of the offences in the said information above specified, because, protesting that he is not guilty of the same, nevertheless the said John Mitchel says that heretofore, to wit, on the fifteenth day of April, in this same term, and in the said eleventh year of the reign of our said lady the Queen, in the said court of our said lady the Queen, before the Queen herself, at Dublin, in the county of the city of Dublin, upon the oaths of twelve good and lawful men of the body of the county of the city of Dublin, then and there sworn and charged to inquire for our said lady the Queen, and for the body of the said county of the city of Dublin, it was presented, &c. (setting out an indictment for publishing a seditious and defamatory libel.)

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"And the said John Mitchel says, that afterwards, to wit, on the 15th day of April, in the year aforesaid, the said John Mitchel was, at the request of the Right Hon. James Henry Monahan, Attorney-General of our said lady the Queen, duly arraigned on said indictment, and such proceedings were thereupon had in the said court of our said lady the Queen, before the Queen herself. That afterwards, to wit, on the 26th day of April, in the said term, the said Right Honourable James Henry Monahan, who in that behalf prosecuted for our said lady the Queen, came into the court of our said lady the Queen, and said that he would not further prosecute the said John Mitchel on behalf of our said lady the Queen, on the said indictment, and that the said John Mitchel should go thereof without day, as by the record and proceedings thereof remaining in the said court of our said lady the Queen, before the Queen herself, more fully appears. And the said John Mitchel avers that he the said John Mitchel, and the said John Mitchel so indicted and arraigned as last aforesaid are one and the same person, and not other and different persons; and that the offences of which he the said John Mitchel was so indicted and arraigned as aforesaid, and the offences in the said information above specified are one and the same offences, and not other and different, to wit, at Dublin, in the county of the city of Dublin aforesaid.

"And the said John Mitchel further saith that he ought, according to the laws and customs of this realm, and the liberties and privileges of the subjects of this kingdom, to be free and exempt, under the circumstances aforesaid, from being compelled to answer for the said supposed offences in the said information specified before any justice or minister of our lady the Queen, or any other judge in any court whatsoever, except upon indictment found, or presentment made, on the oath of twelve good and lawful men of the body of the county in which said supposed offences were committed, and this he the said John Mitchel is ready to verify; wherefore he prays judgment if the said court of our said lady the Queen, now here, will or ought to take cognizance of the information aforesaid, and that by the court here he may be dismissed and discharged, and so forth.

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Demurrer to this Plea.

“ And the said Right Honourable James Henry Monahan, Attorney-General of our said lady the now Queen, who prosecutes for our said lady the Queen in this behalf, as to the said plea of the said John Mitchel, by him above pleaded and set forth, for our said lady the Queen, saith, that the said plea and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to preclude the court of our said lady the Queen from proceeding upon the said information against him the said John Mitchel, and that our said lady the Queen is not bound by the law of the land to answer the same; and he the said Attorney-General, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said plea; that is to say—

“ That it is uncertain whether the said plea is a plea in bar or a plea in abatement, and also that the same is in other respects uncertain, informal, and insufficient, and so forth; and this he the said Attorney-General, who prosecutes as aforesaid, is ready to verify. Wherefore, for want of a sufficient plea in this behalf, he the said Attorney-General prays judgment, and that the said John Mitchel may be convicted of the premises above charged upon him in and by the said information.

Joinder.

Joinder in
demurrer.

“ And thereupon the said John Mitchel, so present here in court in his own proper person, saith, that the said plea of him the said John Mitchel, in manner and form aforesaid, as the same is above pleaded and set forth, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to preclude the said Right Honourable James Henry Monahan, the Attorney-General for our said lady the Queen, who for our said lady the Queen prosecutes in this behalf, from further prosecuting the said information against him the said John Mitchel; and this he the said John Mitchel is ready to verify and prove the same, as the court here shall direct and award. Wherefore and because the said Attorney-General, for our said lady the Queen, hath not answered the said plea, nor hitherto in any manner denied the same, the said John Mitchel prays judgment of the said information, and so forth.”

The demurrer in the first case being now (May 8th) called on for argument, was opened by

John Perrin, for the Crown.—The defendant's plea is bad. First; an indictment pending is no bar to an information for the same offence. Secondly, the entry of a *nolle prosequi* has put an end to the indictment. In 2 Hale, P. C. 239, it is stated “if A. be indicted for the murder of B., and there is another indictment afterwards taken of the same death against the same person, and he is arraigned upon the second indictment because it is the King's suit, the second shall not abate; yet usually the justices quash the other by judgment.” And Hawkins (2 P. C.,

book 2, ch. 34, sect. 1,) says, "That it hath been holden that it is no good plea in abatement of an indictment as it is of an appeal or information, that there is another indictment against the defendant for the same offence. But in such a case, the court, in its discretion, will quash the first indictment if any fault can be found with it." There is no difference whatever between the case of an indictment and an information (like the present). From the passage in which Hawkins refers to the cases where informations do not lie after a previous information, it is plain that he refers to *qui tam* informations. In book 2, ch. 26, sect. 1, he enumerates the matters for which an information lies; and in section 4, he says, "As to the second particular, viz., what ought to be the form of similar informations: having already, in the chapter of indictments, incidentally shown the principal points relating to this matter, I shall only take notice in this place, that seeing an information differs from an indictment in little more than that the one is found by the oath of twelve men and the other is not so found, but is only the allegation of an officer who exhibits it, whatsoever certainty is requisite in an indictment the same at least is necessary also in an information, and consequently, as all the material parts of the crime must be precisely found in the one so must they be precisely alleged in the other, and not by way of argument or recital." So, in Bacon's Abridgment (title Information, A.), it is said an information may be defined, "an accusation or complaint exhibited against a person for some criminal offence, either immediately against the King or against a private person, which from its enormity or dangerous tendency, the public good requires should be restrained or punished, and differs principally from an indictment in this, that an indictment is an accusation found by the oath of twelve men, whereas an information is only the allegation of the officer who exhibits it." Where, in chapter 26, Hawkins treats of a prior suit depending, being a plea to an information, his observation is evidently confined to cases of *qui tam* informations, for in section 63 he says, "As to the first point, viz., where a prior suit depending may be pleaded to such an information or action, it seems agreed, that wherever any *suit on a penal statute* may be said to be actually depending, it may be pleaded in abatement of a subsequent prosecution, being expressly averred to be for the same offence." And in section 66 of the same chapter, he says, "As to the third point, viz.: what is a good general issue, and where it may be pleaded, I shall observe the following particulars: first, that if the defendant plead *nil debet* to an action or information *qui tam*, it is the safest to say that he owes nothing to the informer, nor to the King." There is not the slightest reference in this chapter, which is chiefly taken up with *qui tam* actions and informations, to show that the author refers to informations *ex officio*, and not one of the cases to which he refers, refers to informations filed *ex officio*. There is this good reason for the distinction in informations *qui tam*, that in such cases the informer is entitled to a portion of the penalty, and it would

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be a hardship that the defendant should be subjected to a second prosecution for a pecuniary penalty, while there was a previous one pending against him. In *Sir William Withipole's case* (Croke, Chas. 147), an indictment having been found against him for murder, his counsel moved "that he ought not to be arraigned upon this because he had been *autrefois* arraigned upon an inquisition of murder, found before the coroner, and had pleaded thereto, &c., and so concluded his plea, by pleading not guilty to the felony. But it was held by all the court that this was no cause of plea, for where he is not convicted or acquitted he may be arraigned in a new indictment." One of the indictments in that case was quashed, but that was not done until the court had ruled that it was not a good plea. And in the case of *John Swan and Elizabeth Jefferys* (Foster's Cr. L. 106, and 18 St. Tr. 1194), "the court was of opinion that the charge in the bill last found must be answered, notwithstanding the pendency of the former, for *autrefois arraign* is no plea in this case; perhaps the bill last found is better adapted to the nature of the case than the former, and the King's counsel must be at liberty to prosecute in such manner as may best answer the ends of public justice; but at the same time the court must take care that the prisoners be not exposed to the inconvenience of undergoing two trials for one and the same fact." In *Reg. v. Goddard and Carlton* (2 Lord Raym. 920), which was an indictment for forging an assignment of a lease, exceptions were taken by the defendants, but there having been a new indictment found pending this matter, it is said "the court would not determine these exceptions, but made him plead to that where these things were amended;" counsel for the defendants then moved "that before the court would make them plead to the new indictment they would enter judgment for the defendants upon this. But the court said "they would make no bargains with them." And the defendants in that case pleaded to the new indictment, *Holt, C. J.* observing that "a man could not plead over in any case but treason or felony, and not in a case of misdemeanor, and that a man after he has been found guilty, cannot plead that indictment, depending in abatement, but must plead *autrefois convict*." That case is an additional authority to show that *autrefois arraign* is not a plea known to the law. In *Rex v. Stratton and others* (Douglas, 239, 240), an information having been filed *ex officio*, the Solicitor-General applied for a rule to show cause why the information should not be quashed, on the ground that a new one was ready to be filed, which stated the offence more particularly, and was better adapted to the nature of the charge; and, in support of the rule, observed that the defendant could not suffer any injury, "because the crown might go on to trial and judgment on the new one notwithstanding the pendency of the other; for that on indictment or information for crimes the pendency of another prosecution cannot be pleaded, as it may be to informations for penalties." *Sir William Withipole's case*, and *Rex v. Swan and Jefferys*, are referred to, and Lord Mansfield observes "that if it was

proper to stop the information, he did not see why the Attorney-General might not do it, by entering a *nolle prosequi*, without the interference of the court." But the judgment of *Buller, J.*, is a clear authority in favour of my argument, he adopts the argument of the Solicitor-General in these words: "What the Solicitor-General has stated, viz., that the pendency of the first information would be no plea to the second, is decisive against this motion." In *Rex v. The Mayor of Plymouth* (4 Bur. 2089), and *Rex v. Phillips and others* (3 Burr. 1565), Lord Mansfield said the Attorney-General had power of himself to exhibit an information on behalf of the crown if he thought proper, and therefore refused to grant a motion for leave to exhibit one; *Rex v. Burnby* (5 Q. B. Rep. 348, per Lord Denman). In *Rex v. Stratton* the very distinctions are taken which are referred to in *Hawkins*, that to an indictment for crimes it is no answer whatever that another prosecution is pending. *Rex v. Webb* (3 Burr. 1468), is an authority to show that the fact of the proceeding of a former indictment is no bar to sending up a fresh bill to the grand jury, and, therefore, that the pendency of the first was no ground of objection to the second (*Rex v. Wynne*, 2 E. 226). To the text writers on Criminal Law I refer, not as authority, but as showing what the received opinion on the subject is. In 1 Chitty's Cr. L. 466, 467, it is said, "it has been holden to be no good plea in abatement of an indictment, that another prosecution for the same offence is depending, though it will be a ground for the court to quash one of them on motion, if it should appear to be defective;" and in 1 Starkie's Cr. Pl. it is said, in page 314, that "where a second indictment is found against a defendant, upon which he is arraigned, after pleading to the first, but before trial, and both indictments are founded on the same transaction, the defendant cannot plead the pendency of the first in abatement, because it is the King's suit;" that is the reason laid down in all the cases, and I submit therefore, that the defendant's plea is bad on that ground. There is a case also, which occurred in this country in 1712, which supports my argument; *Reg. v. Dudley Moore* (Append. to the Comm. Journ. 275), that case was a good deal canvassed in 1829, in the case of the Bottle Conspiracy, and the legality of the course was never questioned. It was relied on by Lord Plunket as an authority, when the case was afterwards investigated in Parliament; and the court will not restrain an Attorney-General from filing an *ex officio* information, upon the ground that a criminal information has been already granted for the same cause (Archb. Cr. Pl. 72—78, *Rex v. Alexander*). These authorities show conclusively that it was no ground of objection, or else the court would have interfered. But secondly, even if the court should think the pendency of a previous indictment a good plea to this information, I contend that the objection does not exist in this case, and that the indictment has been put an end to by the entry of a *nolle prosequi*. The Attorney-General has furnished me with some authorities from the Crown office in England, on the subject, which establish the proposition. In *Rex v. Doctor Purnell*,

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which is also reported in W. Blackst. 37, and in *Rex v. West*, in 1801, a *nolle prosequi* was entered, and then a new information filed; so in *R. v. Switzer*, in 1812, and in case of *Rex v. Francis Kinchela and others*, a *nolle prosequi* was entered by Mr. Attorney-General Plummer, that an information might be filed against them, and an information was filed against them afterwards. In Coke Litt. 139a, it is said "the King's Majesty cannot be nonsuited, because in judgment of law he is ever present in court; but the King's attorney *qui sequitur pro domino rege*, may enter an *ulterius non vult prosequi*, which hath the effect of a nonsuit; but in an information by an informer, *qui tam*, &c., the informer may be nonsuited." In *The Attorney-General v. Buckeridge* (Hardr. 83), it is said "if the King, by his attorney, enter a *non vult ulterius prosequi*, the King cannot afterwards proceed in the same suit, but he may begin anew, and this by reason of the prejudice which otherwise might accrue to the subject;" *Rex v. Pickering* is there cited as an authority for the position, but I have not been able to discover the case. *Goddard v. Smith* (1 Salk. 21, and 6 Mod. 261, S. C.), *Rex v. Stratton* (Dougl. 239) is also an authority to the same effect. In 1 Salk. p. 20, the case of *Goddard v. Smith* is reported in this way:—"An action was brought for a malicious indictment, whereof the plaintiff was *legitimo modo acquietatus*, and upon the trial it appeared he was acquitted no otherwise than by the entry of a *nolle prosequi*; the court held this evidence did not support the declaration, for the *nolle prosequi* is a discharge of the indictment, but is no acquittal of the crime; and the Chief Justice doubted as to the latter matter, and was of opinion that the crown, notwithstanding the *nolle prosequi*, might award new process upon the same indictment." But from the better report of the case in 6 Mod. (p. 261, case 374), it seems that whatever the Chief Justice thought, the court made no rule, and Harcourt, the master of the office, stated that there never had been any proceedings after a *nolle prosequi*, and Powell, J. quoted a case in Hardres, in which a *nolle prosequi* was entered on an information, and held to be a discharge of it, *Attorney-General v. Bagg & Marsham* (Hardr. 126). *Turner v. Gallilee* (Hardr. 153), seems to throw some doubt upon it, but the proposition which was doubted by Hardres, that a *nolle prosequi* is no bar to further proceedings, is laid down in a note to *Salmon v. Smith*, in 1 Saunders, 207, note (2). The course adopted here by the Attorney-General is the only one he could properly have pursued; if he had asked the court to quash the indictment, they would have said he could have entered a *nolle prosequi* (2 Hayes Cr. L. 573). There is also an ambiguity in the defendant's plea; it does not distinctly appear whether it is a plea in bar or in abatement; it alleges that an indictment has been found against the defendant for the same offence, but does not say that it is pending. if that be so, it is a plea in bar, and not in abatement.

Sir Colman O'Loghlen.—On the record, as it stands, there has been a discontinuance, and the crown is now out of court. The plea states that an indictment was found this term, and that the defendant was duly arraigned on the said indictment, and that

such proceedings were thereupon taken, that afterwards, to wit, on the 20th day of April, in the said term, the Attorney-General came into the court of our said lady the Queen, and said that he would not further prosecute the said John Mitchel, on behalf of our said lady the Queen, on the said indictment, and that the said John Mitchel should go thereof without day; the plea then states that the defendant is the same person against whom the indictment was found, and that he ought not to be compelled to answer for the said supposed offences in the information specified, except upon indictment found, or presentment made, on the oath of twelve good and lawful men of the county in which said supposed offences were committed, and it prays judgment, if the court will or ought to take cognizance of the information, and that he may be discharged, and so forth. That is a plea in abatement. It is not indeed a plea of an indictment pending, but it is a plea raising this question, whether the Attorney-General can proceed by *ex officio* information, after having proceeded by indictment; in fact, whether by proceeding by indictment he does not thereby lose his privilege of proceeding *ex officio*. The demurrer in this case is a demurrer in bar to a plea in abatement, and therefore there is a discontinuance, and the crown are out of court. The demurrer prays conviction; it should have prayed that the defendant should answer over. A discontinuance may be either caused by the non-entry of proper continuances, or, secondly, by mispleading, which creates a chasm in the regularity which ought to exist in a suit from its commencement to its conclusion. A demurrer in bar to a plea in abatement, is a discontinuance, *Carter v. Davis* (1 Shower, 255, 1 Salk. 218), *Saunders Rep.* 210 *e*, (note,) *Cochrane v. Fitzpatrick*, 8 Ir. Law Rep. 187, 2 Com. Dig. tit. Pleader, W. 2. If a defendant plead in abatement, and the plaintiff reply as to a plea in bar, this is a discontinuance; *Alice v. Gale* (10 Mod. 112). The rules of criminal and civil pleading are the same. It may be said that this is a plea in bar, but this argument cannot be maintained, as the beginning and conclusion determines the nature of the plea. "It is the conclusion of a plea, and not the matter of it, that makes a plea in abatement, so that, should a man plead a plea that, for the matter of it, might have been pleaded in bar, and conclude *petit quod breve cassetur*, it would be but a plea in abatement, and the judgment could be no other than a *respondeas ouster*, and *vice versa*, *Alice v. Gale* (10 Mod. 112). "If a man pleads matter which goes in bar, but begins and concludes his plea in abatement, it will be a plea in abatement, for it is the beginning and conclusion that make the plea," *per Holt, C. J., De Medina v. Stoughton* (1 Ld. Raym. 593.) "If a plea, commencing in abatement, show matter in bar, and concludes in abatement, it is a plea in abatement, not in bar," *Godson v. Good* (6 Taunt. 587). This is a plea in abatement: it begins and concludes properly: it is analogous to a plea of privilege by an attorney, stating his privilege not to be compelled to answer to an action commenced against him by bill. In *Chatland v. Thornley* (12 E. 544), the conclusion of the plea was the same as the plea here. The plea there was a plea of

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privilege, by an attorney, that he ought not to be compelled to answer in any other manner whatsoever, except by bill, to be exhibited against him, as an attorney of the court, and concluded, "wherefore he apprehends that the court here will not, and ought not, to take further cognizance of the action aforesaid, depending against him."

And the Court said, "it was not to be considered a plea to the jurisdiction, it only objected to the court's taking cognizance of the action against one of its attorneys, in this form." That is exactly the plea which is filed here: we do not deny the jurisdiction of the court here, to take cognizance of the offence in another form. That case fully establishes that this is a plea in abatement, but the joinder in demurrer being in bar, it is a discontinuance. It must be either a plea to the jurisdiction, or in abatement; in either case the crown is wrong, for the court cannot give judgment of *respondent ouster*. But if the joinder in demurrer is good, still the plea here is good. An Attorney-General cannot file an *ex officio* information after proceeding by indictment. The King has two modes of proceeding:—first, by indictment; secondly, by information. "An indictment is an accusation or declaration at the suit of the King for some offence, found by a proper jury of twelve men" (Com. Dig., tit. Indictment, A.) "An information is a declaration of the charge or offence against any one at the suit of the King" (Com. Dig., tit. Information, A. 1). The two proceedings are not perfectly the same. The King can proceed by indictment for any offence; by information he can only proceed for misdemeanor; and in all cases the proceeding by indictment is more constitutional. In 2 Hale's P. C. c. 20, p. 157, it is said, that "In all criminal proceedings the most regular way and most consonant to the statutes of Magna Charta, is by presentment or indictment of twelve sworn men." In misdemeanor cases the crown has it always at its option to proceed by indictment or information, and the position we contend for is, that when once it has exercised its election and adopted the "more regular and safer way," it cannot fall back and adopt the other alternative at its caprice; or if it be allowable at all to do so, it is at least only in the excepted case to prevent the failure of justice by the contumaciousness of a grand jury. There is no precedent to be found in any book of an Attorney-General proceeding as here by an *ex officio* information after entering a *nolle prosequi* on a good and valid indictment; and that very fact is a strong argument against it. Lord Coke, in his Commentary on Littleton, s. 108, speaking of a passage in the Statute of Merton, says, "Note.—It hath been a question how these words shall be understood, as it seemeth to some that no action can be brought upon this statute, insomuch as it was never seen or heard that any such action was brought; and if any action might have been brought for such matter, it shall be intended that at some time it would have been put in use." The doctrine of election is very much favoured by our law. At common law a grantee of an annuity could not distrain and have a writ of annuity. He could elect to proceed either way; but once having elected

by matter of record, he was bound by that election. (Co. Litt. 145, *a*. 1 Thomas's edit. of Co. Litt. 450.) So says Lord Coke, *s. 6*, "If a wife be endowed *ex assensu patris*, and the husband dieth, at the husband's death, the wife hath election either to have her dower at the common law or *ex assensu patris*; but if she bring a writ of dower at the common law, and count, albeit she recover not, yet she shall never after claim her dower *ex assensu patris*." This principle of election is equally applicable to criminal proceedings. If a party may be either prosecuted under a statute or at common law, if the prosecutor adopts one course, he thereby determines his election, and cannot prosecute under the other; *Anonymous* (12 Mod. 446). So here, the Attorney-General had two modes of proceeding, and by adopting one he has determined his election, and cannot resort to the other. The court refused to allow a party to file an information on a penal statute, enabling the party damaged to proceed upon an information or indictment when he had proceeded by indictment, and the indictment was afterwards quashed; *Anonymous* (8 Mod. 187). Though this case is not an exact authority, as the party could only file an information by leave of the court, it is illustrative of the principle that a party, after electing to proceed by one course, cannot proceed by the other, as here, where the Attorney-General has capriciously entered a *nolle prosequi*. The court ought to show no favour to *ex officio* informations, and should not extend the privilege beyond those limits for which precedents can be shown. There are only two cases on record in which the Attorney-General has proceeded by *ex officio* information after indictment. The one is *The Bottle case*, where Lord Plunket proceeded by *ex officio* after the grand jury had thrown out the bill; (*a*) the other was the case of *Rex v. Dudley Moore*. In the first the grand jury ignored the bill, and there might have been a failure of justice. In the latter case the circumstances were very peculiar. The particulars of it are to be found in the 2nd vol. of the Irish Commons Journals, App. 275, 276. It is the report of the committee appointed to inspect and inquire what proceedings were taken in that case. In November, 1713, a riot occurred in the theatre in relation to the play of *Tamerlane*, in which Mr. Moore was concerned; he was bound over to appear at the ensuing term, and a bill was sent up against him; the bill was returned on the last day of term, with *billa vera* on it. After the bill had been recorded, and the Attorney-General left court, Alderman Gore, the foreman of the grand jury, came into court and stated that the bill had been ignored, but by mistake was marked *billa vera*. The court refused to alter the record, the grand jury having been discharged. The entire grand jury then made application to the court, but the court still refused, and Mr. Moore was bound over to appear in Hilary Term. In Hilary Term he appeared, and then, the report states, "That upon Mr. Attorney-General's motion, on the 27th January, 1714, there was a rule for trial on the Thursday following, and the traversers

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(*a*) See Green's Report of the case of *Rex v. Forbes and others* (Hil. T. 3rd Geo. 4th), commonly known as *The Bottle case*.

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were ordered to prepare; that the rule for trial was vacated on the 4th of February, upon Mr. Attorney-General's motion, though opposed by the counsel for the traversers, who pressed for and insisted on their trial coming on on the day appointed for it;" that upon the next day, the 5th of February, there was a rule entered as by consent of the Attorney-General, "though not moved for or consented to by the counsel for the traversers, that the indictment should be quashed, and all the gentlemen, and particularly the said Dudley Moore, should be discharged; that before the essoign-day of Easter Term there was an information filed by the Attorney-General for the same matter, against Dudley Moore, Esq., upon which process issued to the sheriff of the city of Dublin; and Mr. Tisdall and Mr. Callwell (deputy clerk of the crown) being asked if they ever knew, after a bill of indictment had been quashed, of an information having been filed for the same matter, answered, they never did." The report then goes on to detail the several proceedings that afterwards took place, and then concludes: "Upon the whole matter, the committee, conceiving the proceedings in this cause to be *very extraordinary* and of great consequence, are unwilling to come to any resolution, but humbly submit the consideration thereof to the House." The proceedings against Mr. Moore, upon the information, were subsequently abandoned. What authority, then, is that case for the proposition that, where there is a *good* indictment, an Attorney-General can of his own capricious humour enter a *nolle prosequi*, and proceed by information? As to the manuscript cases which have been cited on behalf of the crown, the only case of an *ex officio* information having been filed, after an *indictment*, was *West's case*, which was a prosecution for perjury in 1801. The other cases were cases of informations being filed after *informations*. *West's case* was analogous to the case of Dudley Moore. It was not a perfectly good indictment. The note, as we have it, is in inverted commas:—"Nolle prosequi entered because the court and justices thereof, where the same is found, had not jurisdiction." But assume those cases were authorities, they are only three solitary instances in either country, and they are cases in which everything passed *sub silentio*. On these grounds, therefore, we submit, we are entitled to judgment. To our plea in abatement, there is a demurrer in bar, and therefore, we submit, there is a discontinuance, and that the crown are out of court. But if the court should be against the defendant upon that point, we submit the plea raises a sound principle of law; and the Attorney-General having elected to take proceedings by indictment, he ought not now to be allowed to exercise, what is called by Lord Holt, "an odious prerogative."

R. Holmes, on the same side.—"There is clearly a discontinuance; the plea is in abatement, or in the nature of one, if it be to the jurisdiction; the only judgment against the defendant which could be given, is *respondeat ouster*. That the plea here is in abatement, *Davis v. Carter* (Carth. 187); *Anonymous* (1 Wilson, 302); *Bisse v. Harcourt* (1 Show. 155). The Attorney-General, in the conclusion of his demurrer, prays "judgment, and that the

said John Mitchel may be convicted of the premises charged upon him in and by the said information," that is, that he be sentenced as if he had been found guilty, the court here cannot pronounce any other judgment against the defendant on this plea, than *respondeat ouster*; but here the Attorney-General insists that the court is to decide that he is guilty. *Bowen v. Shapcott* (1 E. 542). If the court here, as prayed by the Attorney-General, should give judgment that John Mitchel is guilty, it would be error on the record.

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The Attorney-General (Monahan), in reply.—The demurrer in this case is in the common form of demurrers to pleas in abatement. It is a little remarkable that no crown case has been cited to show that it is incorrect in form. It is new doctrine that the mode of praying judgment alters the nature of a demurrer, for whatever be the prayer of judgment the court will give a right judgment. *Carter v. Davis* (1 Show. 255, 1 Salk. 218, S. C.) is not in point, even if the analogy did exist between civil and criminal cases. In that case the plaintiff's demurrer is, that the plea is not sufficient in law to prevent him from maintaining his aforesaid action. It certainly is very difficult to ascertain what Mr. Mitchel means by his plea. It is not that the court ought not to take notice of what is charged in this information, but that the court ought not to take cognizance of the offence at all, because the Attorney-General has entered a *nolle prosequi* upon the indictment. He does not state what the act of the court was, whether the indictment is pending, or what has become of it (read the plea). In a latter part of it he says, that the court ought not to take cognizance of the information itself. The demurrer in this case is framed according to the precedents; what it states is, that the matters contained in the plea are not sufficient in law to preclude the court from proceeding upon the information. But what is the plea? In part, that the court are not to have jurisdiction of the offence at all; in another part, that the court are not to have jurisdiction of this information; 1st Wentworth, Pl. 24, Plea in Abatements; (1 Chitty, Cr. L. 448.) The precedent of a demurrer is precisely as here. In *Reg. v. O'Connell* (1 Cox's C. C. 365, and Arm. & Trevor Rep. 62), where the plea was that the indictment ought to be quashed, the demurrer of the Attorney-General was in that case, in the very form of the present, that the matters therein contained are not sufficient in law to preclude the court from proceeding on this indictment, and prays judgment, and that the said Daniel O'Connell be convicted of the premises. I admit that the court in that case decided, that in a clear case of a plea in abatement, the judgment, where it is against the prisoner, is *respondeat ouster*. I submit, therefore, that on technical grounds there is no valid objection to this demurrer. As to the remaining objection, that because an Attorney-General enters a *nolle prosequi* upon an indictment, he is precluded proceeding by information for the same offence, I admit that it may be doubted, as it appears it was by Holt, C. J., in *Goddard v. Smith*, 1st Salkeld, 21, whether the entry of a *nolle prosequi* has the effect of a *stet processus*; but I maintain that it cannot go further than a nonsuit in a

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civil case, which is no bar to fresh proceedings (Coke Litt. 139, *a*). The case of *Turner v. Gallilee*, in Hardres's Rep., is to the same effect. In *Goddard v. Smith* (6 Mod. 261, 262), the principle is laid down very clearly. Until the present case, nobody, I believe, ever doubted that the law officer of the crown has the power to enter a *nolle prosequi*, and institute fresh proceedings. It does not amount to a pardon, nor to an acquittal; at most, it amounts only to a nonsuit, but in the plea there is no allegation that a *nolle prosequi* actually was entered, but merely that the Attorney-General informed the court that he would not further prosecute the said John Mitchel on the said indictment, and that the said John Mitchel should go thereof without day, as by the records and proceedings thereof, remaining in the said court of our said lady the Queen, before the Queen herself, more fully appears. If the fact of the entry of a *nolle prosequi* be doubted, it would have been open to the defendant's counsel to have come to the court and asked them to quash the information, but he must know that it was entered, because he said in his plea, that the indictment ought to be quashed, because it was found by a grand jury, one of whom was a person who ought not to have been upon it,—a circumstance over which I had no control.

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To the second information in this case, the defendant filed the following plea:—"And now at this day, that is to say, on the first day of May, in the eleventh year of the reign of our lady the Queen, comes the said John Mitchel, in his own proper person, into the court of our said lady the Queen before the Queen herself, and prays judgment of the said information, and that he may not be compelled to answer the same, because, he says, that heretofore, to wit, on the fifteenth day of April, in this same term, and in the said eleventh year of the reign of our said lady the Queen, in the said court of our said lady the Queen, before the Queen herself, at Dublin, in the county of the city of Dublin, upon the oaths of twelve good and lawful men of the body of the county of the city of Dublin, then and there sworn and charged to inquire for our said lady the Queen, and for the body of the said county of the city of Dublin, it was presented that John Mitchel, late of Ontario Terrace, in the parish of Saint Peter, and county of Dublin, gentleman (here an indictment against the defendant for seditious publications was set out), as by the record thereof, remaining in the said court of our said lady the Queen, before the Queen herself, to wit, at Dublin, in the county of the city of Dublin, more fully and at large appears. And the said John Mitchel, in fact, saith, that he the said John Mitchel, and the said John Mitchel so indicted as last aforesaid, are one and the same person, and not other and different persons; and that the said several supposed offences in the said several counts of the said indictment mentioned and specified respectively, of which he the said John Mitchel was indicted as aforesaid, and the said several supposed offences in the said several counts of the said information above-mentioned and specified, are the same offences, and not other and different offences, to wit, at Dublin, in

the county of the city of Dublin aforesaid. And the said John Mitchel further avers, that he the said John Mitchel was afterwards, to wit, on the said fifteenth day of April in the year aforesaid, duly arraigned on the said indictment. That the said indictment, so as aforesaid, found against him the said John Mitchel, by the jurors aforesaid, is still depending against him the said John Mitchel, in the said court of our said lady the Queen, before the Queen herself, and this the said John Mitchel is ready to verify, wherefore he prays judgment of the said information, and that he may not be compelled to answer the same, and so forth." *Replication.*—"And hereupon the said Right Honourable James Henry Monahan, Attorney-General, for our said lady the now Queen, in the said Court of our said lady the Queen, before the Queen herself, who, for our said lady the Queen, in this behalf, prosecutes, with, that by reason of anything in the said plea of the said John Mitchel, above pleaded alleged, that our said lady the Queen ought not to be precluded from prosecuting the said information against the said John Mitchel, because, he says, that after the said arraignment of the said John Mitchel, upon the said indictment, in the said plea mentioned, to wit, on the twentieth day of April, in the said eleventh year of the reign of our sovereign lady the Queen, and before the exhibiting of the said information, came the said John Mitchel, by Martin Francis O'Flaherty, his attorney, into the Court of our said lady the Queen, before the Queen herself, at Dublin, in the county of the city of Dublin, and having heard the said supposed indictment read, protesting, that he was not guilty of the said supposed offences in the said supposed indictment specified, or any of them, or any part thereof, for plea in abatement, nevertheless, thereto said, that he ought not to be compelled to answer the said supposed indictment, and that the same ought to be quashed, because, he said, that Henry Bowles, of No. 6, Upper Pembroke-street, in the county of the city of Dublin, Esq., one of the jurors by whom the said supposed bill of indictment was found a true bill, was at the time of his being sworn as aforesaid, as a juror aforesaid, and also at the time of his finding said bill a true bill, a member of the council for the time being of the borough of Dublin, and thereby, to wit, by being such member of such council, pursuant to the statutable enactments in such case made and provided, disqualified from serving as a juror aforesaid, the jurors aforesaid being a jury summoned within the borough of Dublin, and not being a jury summoned within the said borough, for an assize or gaol delivery; and the said John Mitchel, by his said plea, averred, that long since and previous to the summoning and swearing of the jurors aforesaid, to wit, on the first day of November, in the year of our Lord, 1841, the act passed in the session of Parliament, held in the third and fourth years of the reign of our sovereign lady Queen Victoria, intituled 'An Act for the Regulation of Municipal Corporations in Ireland,' came into and still was in operation, in the said borough of Dublin; and that he the said John Mitchel was ready to

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verify; whereupon he prayed judgment of the said supposed indictment, and that the same might be quashed, and so forth. And the said Attorney-General further saith, that afterwards and after the said pleading of the said plea, and before the exhibition of the said information, to wit, on the twenty-sixth day of April, in the said eleventh year of the reign of our said lady the Queen, at Dublin, in the county of the city of Dublin, he the said Attorney-General, who in that behalf prosecuted for our said lady the Queen, came into the court of our said lady the Queen, before the Queen herself, at Dublin, in the county of the city of Dublin, and further said, that he would not further prosecute the said John Mitchel, on behalf of our lady the Queen, on the said indictment, and let all further proceedings be altogether stayed in the said court of our said lady the Queen, against the said John Mitchel, upon the indictment aforesaid; and thereupon, in the Court of our said lady the Queen, before the Queen herself, upon the said twenty-sixth day of April, in the said eleventh year of the reign of our said lady the Queen, at Dublin, in the county of the city of Dublin, and before the exhibiting of the said information, it was considered and adjudged by the court of our said lady the Queen, against him the said John Mitchel, upon the said indictment aforesaid, as by the records and proceedings thereof remaining in the said court of our said lady the Queen, before the Queen herself, more fully appears, and this he the said Attorney-General of our said lady the Queen, is ready to verify; wherefore he prays judgment, and that the said John Mitchel may be convicted of the premises in the said information above specified." To this replication the following demurrer was filed:—"And the said John Mitchel present here in court, in his own proper person, as to the said replication of the said Right Honourable James Henry Monahan, Attorney-General for our said lady the Queen, who for our said lady the Queen prosecutes in this behalf, to the said plea of him the said John Mitchel, says that the said replication and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to compel him the said John Mitchel to answer the said information against him the said John Mitchel, and that he the said John Mitchel is not bound by law, to answer the said replication, and this he the said John Mitchel is ready to verify; wherefore, for want of a sufficient replication in this behalf, he the said John Mitchel prays judgment of the said information, and that he the said John Mitchel may not be compelled to answer the same, and so forth.

"And the said John Mitchel states and shows to the court here the following causes of demurrer in law to the said replication; that is to say,—

"For that the matters contained in the said replication are not a legal answer to the plea of the said John Mitchel; and also for that the said Attorney-General of our said lady the Queen doth not, by his said replication, confess, avoid, or traverse, and deny that the said indictment so found against the said John Mitchel,

and whereon the said John Mitchel was arraigned as aforesaid, was, at the time of the filing of the said plea in abatement, still depending in the court of our said lady the Queen, here before the Queen herself, as by the said John Mitchel, in his said plea in abatement in that behalf, alleged; and also for that the said replication attempts to put in issue matters impertinent and immaterial to the said information; and also for that the said replication is an argumentative traverse of the matters stated in said plea; and also for that the said replication amounts to a replication of *nul tiel record*; and also for that the said replication ought to have been *nul tiel record*; and also for that the said replication tenders an immaterial issue; and also for that the said Attorney-General of our said lady the Queen, by his said replication, hath not offered to verify the same by the record; and also for that the said replication attempts to put in issue upon a trial *per pais* matter of law, and not matter of fact; and also for that the said replication should have concluded with a special traverse of some of the facts stated in said plea; and also for that the said replication is in other respects defective, uncertain, informal, and insufficient.

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Joinder.—"And the said Right Honourable James Henry Monahan, Attorney-General for our said lady the Queen, in the court of our said lady the Queen, who prosecutes for our said lady the Queen in this behalf, saith that the replication of him the said Right Honourable James Henry Monahan, Attorney-General, in form aforesaid, above pleaded, and the matters therein contained, are sufficient in law to convict him the said John Mitchel of the premises in the said information above specified; and the said James Henry Monahan, Attorney-General as aforesaid, who prosecutes as aforesaid, is ready to verify and prove the same as the court shall direct and award. Therefore, inasmuch as the said John Mitchel has not answered the said replication, nor in any manner rejoined to the same, the said Attorney-General, for our said lady the Queen, prays judgment, and that the said John Mitchel may be convicted of the premises in the said information above specified."

Immediately after the argument of the demurrer in the previous case, before judgment was pronounced upon it, the demurrer in the second case was called on.

John O'Hagan (with whom was *Sir Colman O'Loughlen*), in support of the demurrer.—The same observation applies in this as in the previous case,—that the demurrer being in abatement and the joinder in bar, effects a discontinuance: *Foxwist v. Tremaine* (3 Saund. p. 210, note (2)), citing *Anon.* (1 Wil. 302; Carth. 137), *Bisse v. Harcourt* (1 Show. 155, and 1 Salk. 177, S. C.), *Carter v. Davis* (1 Show. 155, case 159, and 1 Salk. 218, and Carth. 187, S. C.) Secondly, the replication is bad. We aver in our plea that the indictment is depending. The Attorney-General has neither confessed and avoided nor traversed the allegation; the replication is an argumentative traverse: *Bourne v. Taylor* (10 E. 189), *Murray v. East India Company* (5 B. & Ald. 212). The proper replication

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to have filed in this case would have been *nul tiel record*: *Green v. Watts* (1 Ld. Ray. 274), *Green v. Purdon* (2 Hud. & Bro. 274). All these cases go to show that if the Attorney-General means to deny the pendency of the indictment, he should have pleaded *nul tiel record*. As a traverse, the replication is bad, being an affirmative upon an affirmative; and in pleading in confession and avoidance, the plea must clearly confess the matter charged, which this replication does not do: *Gould v. Roxborough* (1 Cr. M. & R. 254), *Taylor v. Cole* (3 T. R. 292).

BLACKBURN, C. J.—As I understand this replication, it does confess the pendency of this indictment.

O'Hagan.—The crown may seek to fall back on our plea; but the plea is a good one. It is, that a second proceeding has been instituted by information while an indictment is still depending against the party for the same offence, which is as much a bar in criminal as in civil proceedings. This is a question of constitutional law. I have found no cases upon the subject, except those which Mr. Perrin has referred to in the previous case, which I think are no authority for the points contended for by the crown. It is a powerful argument in favour of the defendant, that the Attorney-General has found no precedent for the course which he has adopted. In *Hawkins*, it is said to be "no plea to an indictment as it is to an information or an appeal." The references which he has given for this are to cases of *qui tam* informations; but simply because the question was never raised in any other. Can it be supposed that such a writer as *Hawkins* would have written so loosely as that, where he only meant informations *qui tam*, he would have used so general an expression? Informations *qui tam* and *ex officio* are all of the same kind, and partake of the nature of a civil case. They are in the nature of a declaration at the suit of the King: *Rex v. Wilkes* (4 Burr. 2569.) There is a great difference between amending an indictment and an information: (*Dyer*, 346, 347.) The distinction sought to be taken between informations for crimes and those under penal statutes cannot be maintained. If the law prohibit the doing of an act, and a statute imposes a penalty, the prosecutor may either proceed for a misdemeanor at common law upon the prohibition or under the statute for the penalty.

MOORE, J.—Informations *qui tam* are of a mixed nature between a civil and a criminal proceeding.

BLACKBURN, C. J.—In *qui tam* informations the person who first files the information has the right to the penalty.

O'Hagan.—In *Owen v. Sperry* (5 Coke Rep. 62, a), it is held that where an action is depending in any of the superior courts, it is a good plea that the writ is brought pending another, although the first action is in another court. *Fitzharris's case* (8 St. Tr. 243), supports our view of this case. Sir John Hawles, in his observations upon that case, gives it as his opinion that an impeachment depending is a good plea. Suppose that before the statute of W. & M., making it necessary for a private prosecutor to come

into court for leave to file an information, an indictment was depending, which did not come up to his views, would he have been allowed to go into the Crown-office and file an information? It is said that an information *ex officio* is of a higher nature than one at the suit of a private individual; still it is not of so high a nature as an indictment found on the oaths of twelve men. A misdemeanor partakes of the nature of civil proceedings, and therefore the rules which apply in civil proceedings ought to prevail.

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John Perrin, contra.—The precedents for demurrers to pleas in abatement, and replications thereto, are precisely in the form which has been adopted here: (4 Chitty Cr. L. 525; 1 Went. 24; 1 Chitty Cr. L. 439, 440.) The precedents in *Wentworth* are similar, and in *Reg. v. O'Connell*. The plea of an impeachment depending, was a plea of the pendency of a suit in full course of proceeding; as to the allegation, that we ought to have pleaded *nul tiel record*, the record would have been at once produced if we had so pleaded, and as the effect of a *nolle prosequi* is doubtful, if we had replied with a special traverse of the pendency of the indictment, the defendant would have replied that the *nolle prosequi* did not put an end to the indictment. As to the argument deduced from the observations of *Hawkins*, it is plain, from the reference he gives for the proposition which he lays down in vol. 2, c. 34, s. 1, that he meant *qui tam* informations.

CRAMPTON, J.—Suppose the course had been reversed, and after an information, the Attorney-General had proceeded by indictment, could it be pleaded to the indictment, that an information had been filed?

Perrin.—If the defendant's plea be, as I submit it is, bad, on general demurrer, it is not necessary to do more than fall back on it.

Sir Colman O'Loughlen.—It is perfectly immaterial whether the plea is bad or good, if there is, as we contend, a discontinuance. Here there is a discontinuance caused both by the replication and joinder in demurrer: *Bisse v. Harcourt* (1 Show. 150, and 3 Mod. 281, S. C.) In the case of *Davenport v. Rafter* (2 Lord Raym. 1053), *Bisse v. Harcourt* is referred to, and the reporter states there the true ground of the decision in that case, as he heard it from Lord Holt himself: (2 Lord Raym. 1053, 1054.) As to the position of the Attorney-General, that the precedents are in the same form as in this case, that is not so. The replication here "prays judgment, and that the said John Mitchel may be convicted of the premises in the said information specified." In Arch. Cr. L., there is a distinction expressly taken between pleas in bar and in abatement, and replications in bar and in abatement; there is a form given in Arch. Cr. L., (edit. of 1846, p. 81), of a replication to a plea of this kind, "hereupon J. N. who prosecutes for our said lady the Queen, in this behalf says, that notwithstanding anything by the said J. S. above in pleading alleged, this court ought not to be precluded from taking cognizance of the indict-

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ment aforesaid, because he says that," &c., and (after stating the matter of the replication,) it concludes thus, "and this he prays may be inquired of by the country;" or if it conclude with a verification, then in this form, "and this he the said J. N. is ready to verify, wherefore he prays judgment, and that the said J. S. may answer to the said indictment." In the same book, p. 85, title Demurrer, it is said that the conclusion of a demurrer in bar is, "wherefore and for want of a sufficient plea in this behalf, he the said J. N., who prosecutes for our said lady the Queen, prays judgment, and that the said J. S. may be convicted of the premises." The author then proceeds to say, that a demurrer to a plea in abatement is in the same form, except that it concludes with praying "judgment, and that the said indictment may be adjudged good, and that the said J. S. may further answer thereto." In the present case there is a double discontinuance caused by the replication, and by the joinder in demurrer. In all cases demurrers are held to be in bar or in abatement, according to the conclusion (*Anon.* 1 Wilson, 302); and, therefore, for this reason alone, the Attorney-General is out of court. As to the replication, it is clearly bad. A party must either traverse, or confess and avoid, or he may introduce new matter, and conclude with a special traverse; but the Attorney-General has adopted none of these courses. He introduces new matter, and concludes praying judgment. He might have confessed the pendency of the indictment, and avoided that confession by showing that we were estopped from alleging its pendency; or he might have denied its pendency by pleading *nul tiel record*. The issue we offer is, that there is another suit depending. Had the Attorney-General meant to deny that, the replication should have been *nul tiel record*: *Green v. Purdon* (2 Hud. & Bro. 273.) The practice is clearly stated in Viner's Abridgment, title Record, N. 21. The present replication is only an argumentative denial of the existence of the record, and therefore bad. But assume for a moment that the court hold the replication good, a *nolle prosequi* is no answer, as it does not put an end to the indictment. The only effect of a *nolle prosequi* is, that the defendant goes without day: *Goddard v. Smith* (6 Mod. 261.) The Attorney-General can compel him to come in again, by issuing a new process. The effect of a *cesset processus* would be different: *R. v. Benson* (1 Sid. 420; 1 Ventris, 33.) [MOORE, J.—Here there is a judgment of the court.] The *nolle prosequi* ought not to be entered as a judgment of the court, it is the mere act of the Attorney-General: *R. v. Benson* (1 Sid. 420; 1 Ventris, 33.) That case decides that the court will not interfere, and will give no judgment. [MOORE, J.—But if the court has done it?] It is erroneous, and as it is still in paper, it may be altered. An information at the suit of the King is a mere civil declaration, and is put an end to by the entry of a *nolle prosequi*; but an indictment is different, it is not put an end to by a *nolle prosequi*, it only puts the defendant without day. [CRAMPTON, J.—What is the result of letting the defendant go without day?] That the

party cannot be brought in again without a new attachment. [CRAMPTON, J.—If so, it is the process which brings him in.] That is another question; the crown may do it: *Goddard v. Smith* (6 Mod. 261, 662.) In *Goddard v. Smith* (6 Mod. 261), it is said, there is no precedent of a *nolle prosequi* being entered on an indictment until the time of Charles II. [CRAMPTON, J.—But it is a common course now.] The form, as stated in 6 Mod. 262, is “*inde non vult ulterius prosequi*,” there is no “*ideo consideratum est*,” there is no judgment of the court. The case of *Attorney-General v. Buckeridge*, cited from Hardres, p. 83, was a private information. With respect to the plea itself there is no doubt that in civil proceedings the pendency of another action has always been held to be a good plea, and *à fortiori* it ought to be in a criminal case. It has been assumed generally, that in criminal cases the rule is different, and that in those cases a prosecution pending is no plea in abatement to a subsequent prosecution. But on examination, however, this doctrine appears to rest upon very slender foundations. There was, in the same way, a general opinion in the profession in Ireland, that there was no right of peremptory challenge in felonies which were not capital, *Gray v. The Queen* (11 Cl. & Fin. 427, and 6 Ir. L. R. 482); but that opinion is now overruled, and also the opinion regarding the discretion of judges as to the discharge of juries in capital cases: *Conway & Lynch v. The Queen* (1 Cox’s C. C. 210, and 7 Ir. L. Rep. 149.) To hold that the pendency of another prosecution is not a good plea in abatement to a prosecution for the same offence, is opposed to every principle of our law, for our law discountenances multiplicity of suits, and there is as much reason why a subject should not be harassed by several prosecutions for the same offence, as there is why he should not be involved in various suits for the same cause of action. At common law a man might be prosecuted in three ways, *first*, at the suit of a private party; *secondly*, at the suit of the crown; *thirdly*, by presentment of a jury. The proposition we contend for is, that in any of these cases, a prosecution pending is a good plea in abatement to a prosecution of a similar character at the prosecution of the same party. First, there is no doubt that a prosecution pending is a good plea to a subsequent prosecution, when both are at the suit of a private party. An appeal was an accusation of a private party against another, for a crime, and it was not confined to crimes where a party suffered a particular injury, but was applicable to all crimes. Thus, a subject might appeal another subject for high treason, until that power was abolished by stat. Edw. III. The pendency of an appeal was a good plea to another appeal (2 Hawk. P. C. c. 23, s. 126), but at the same time the pendency of an indictment was not a good plea to an appeal, for one was at the suit of the King, and the other of a subject; nor was an acquittal on an indictment a bar to an appeal. On principle, as a private party could not have two accusations pending, so the King should not have two accusations pending for the same offence. An infor-

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mation differs only from an appeal in that it is an accusation at the suit of the King, for the crime; and an indictment only differs from an information in being an accusation on the oaths of twelve men, in place of the suggestion of the crown officer. Both indictments and informations are proceedings at the suit of the King. The jurors are sworn for our lady the Queen, from the body of the county. An indictment differs from a presentment, in the one being at the suit of the King, the other not: (4 Bl. Com. 301.) Then, judging from analogy, the pendency of an indictment ought to be a good plea in abatement to a subsequent indictment or information, for the same offence. With respect to indictments, in the text books, it is usually laid down that an indictment pending is no good plea in abatement to a subsequent information. Hawkins, indeed, expresses no opinion of his own upon it; all he says is, "it hath been holden that it is no good plea in abatement of an indictment, that there is another indictment against the defendant for the same offence," and he cites as his authority, Lord Hale, *Swan & Jefferies' case* (Fost. Cr. L. 105, 106), and *R. v. Withipole* (Cro. Car. 147), but the whole weight falls on *Withipole's case*. Lord Hale says (P. C. c. 30, 111), "if A. be indicted for the murder of B., and there is another indictment afterwards taken of the same death, against the same person, and he is arraigned upon the second indictment, *because it is the King's suit*, the second shall not abate, but usually the justices quash the other by judgment." But Hale is not an accurate writer: (Fost. Cr. L. Preface and Advertisement.) There are many false positions in his Pleas of the Crown: for instance, it was on his authority that it was held that jurors might be discharged in criminal cases, which has been since decided to be wrong. Foster, in p. 26 of his Preface to the first edition of his work says, "if Chief Justice Hale's health or leisure in his declining years had permitted him to revise his History of the Pleas of the Crown, and to render it as correct as his great abilities would have enabled him; or perhaps, had that valuable work been published as correctly as he left it, I mean from the transcript, corrected and improved in great measure with his own hand (the whole, probably, under his direction certainly, found among his papers after his death), in either of these cases every attempt of this kind might have been judged altogether useless." Implicit credence is not to be placed on a passage in Hale, even assuming it to be his deliberate judgment; for it seems based on no intelligible principle, and if the reason which supports his position fails, it must fail also. He says, the reason why it shall not abate is, "because it is the King's suit;" but he is entirely wrong in stating that the King can carry on a multiplicity of suits; on the contrary, it is settled that the King shall not have two suits for the same causes. To an information *qui tam*, whether at the suit of the King alone, or otherwise, a plea of the pendency of another information is a good plea: (2 Hawk. P. C. c. 26, s. 63.) An appeal pending is a good plea to an appeal (2 Hawk. P. C. c. 23, s. 126); and in lib. 11, c. 25, s. 12, Hawkins says, "whatsoever

may be pleaded of an appellee, either in bar or in abatement of an appeal, while it is carried on at the suit of the party, may as well be pleaded by him; when it is prosecuted at the suit of the King;” there the reason given by Lord Hale falls to the ground. *Swan & Jefferies’ case* (Fost. Cr. L. 104), decided in 1751, was a circuit case, and not decided by the court in Banc; it went on the authority of *Withipole’s case*, and without that authority it could not stand for a moment, for the reason assigned for the decision is untenable. “Perhaps the bill last found is better adapted to the nature of the case than the former, and the King’s counsel must be at liberty to prosecute in such manner as may best answer the ends of public justice,” is Judge Foster’s reason; but surely the ends of public justice do not require that two prosecutions should be depending at the same time, and to establish the rule for which, we contend, would cause no inconvenience; as when a second indictment is preferred the previous one may be quashed. *Withipole’s case* (Cro. Car. 147), in 4 Car. 1, is, in fact, the authority on which the tradition rests. The case is badly reported, and it is doubtful whether the plea pleaded was in bar or in abatement; but assuming that *Withipole’s case* is good law, yet it is only a decision, that a *coroner’s inquisition* pending is no plea in abatement to an indictment, not that an *indictment* pending is not a good plea, and even the reporter says the judges were not free from doubt, “and to avoid doubt it was held that the first inquisition should be quashed.” That is the whole authority upon which the position rests, as to indictments. As to informations, the only authority is the *obiter dictum* of the Solicitor-General of the day, in *R. v. Stratton* (Dougl. 240), and Solicitor and Attorney-Generals are not always infallible; and it is remarkable that great care has always been taken, not to raise the question, as in all cases where two informations have been filed, care has been taken to terminate the proceedings in the former one regularly. The first case was *Rex v. Redpath* (10 Mod. 152), there an information for a libel was preferred against Redpath, a *nolle prosequi* was entered, and after that a second information was filed. The second case of the kind was in 1748, *Rex v. Dr. Purnell* (1 Sir W. Blackst. 37); the defendant was Vice-Chancellor of Oxford, and the Attorney-General filed an *ex officio* information against him for neglect of duty; the defendant appeared upon that information; a *nolle prosequi* was entered, and after that a new one was filed; in that case, to authorize the *nolle prosequi*, the express order of the King, under the sign-manual, was lodged in the Crown-office. The third case was *Rex v. Stratton* (Dougl. 240), the information was filed for subverting the Government of Madras, and by the very Solicitor-General whose doctrine has been relied on by the crown, a *nolle prosequi* was entered, and then a new information was filed. This appears from the report of the same case, in 21 St. Tr. 1049. A *nolle prosequi* stands in a different position in respect to an indictment and an information; in the latter case it finally terminates the proceedings, in the former not: *Goddard v. Smith* (6 Mod. 261), *R. v.*

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Benson (1 Sid. 420.) These cases establish what the practice has been; and surely, it cannot be law, that an Attorney-General is entitled to come into court, and file informations as often as he pleases, for the same offence. If he may do so, and go on *ad infinitum*, it might give rise to great harshness and oppression. The position we contend for is, that where the proceedings are both of the same nature the plea of a proceeding pending is good. Here they are both of the same nature, in this, that they are both prosecutions at the suit of the crown. Mr. Perrin referred to a case in Archbold's Cr. L., where the court refused to prevent the Attorney-General from proceeding, because an information had been filed by leave of the court: but that was a motion to the discretion of the court; and in p. 78, it will be seen that the court stayed the private prosecutor. The principle has been acted on by courts of justice in the case of informations, that there should not be two proceedings for the same offence. In *R. v. Robinson* (1 Sir W. Blackst. Rep. 542), Lord Mansfield says that, as a general rule, they would not grant a criminal information for bribery at a parliamentary election, till after two years was expired, in which a civil action might be brought. *Sir Wm. Withipole's case*, is no authority. Even if it is, it is only in cases of *indictment*, which are the excepted cases: *Dr. Foster's case* (10 Co. Rep. 596.) If an information pending be a good plea to an *information*, an *indictment pending* must likewise be a good plea to an information.

Monahan, A. G., in reply.—Sir Colman O'Loughlen in one part of his argument answers himself. The replication states, that to a former indictment the defendant pleaded in abatement, and that by order of the court, a *nolle prosequi* had been entered. If the entry of that was no final judgment we could not have pleaded *nul tiel record*.

MOORE, J.—You are met by another argument, that the replication states argumentatively, that the indictment is not pending.

CRAMPTON, J.—Do they not show, that by analogy to civil cases, you should have pleaded *nul tiel record*?

The *Attorney-General*.—The entry in this case is, "that further proceedings be stayed." The replication would only be argumentative if the proceedings were out of court; the replication states that the suit is pending, but that proceedings have been stayed. Suppose a party pleads *lis pendens*, and the court makes an interlocutory order that the party go without day, and that the fact of the making the order would be a good answer to such plea, in what other way could it be pleaded? But the defendant's plea is bad on general demurrer; it does not state that the defendant has pleaded to it; as was done in *Sir Wm. Withipole's case*, so here, if the prisoner's counsel had any doubt that proceedings might be hereafter taken on the indictment, they might have applied to have the indictment quashed. In 2 Hale's P. C. 221, 222, it is laid down that "if there be an inquisition before the coroner, of murder, and returned, and likewise an indictment for the same offence, by the grand inquest, it is usual to arraign the prisoner upon the indictment,

but he may be arraigned upon both at the same time, but if arraigned upon the indictment only, there ought to be an entry of *cesset processus* upon the coroner's inquest, as to the prisoner, who may otherwise be outlawed upon it." As to the observations of Mr. Justice Foster, regarding the inaccuracy of Lord Hale's writings, he has, in his second edition, fully retracted what he said, and in his own book he reports a case such as the present, *Swan & Jefferies' case* (Fost. Cr. L. 104), and I cannot see what difference it can make, whether the proceeding be by information or indictment; as to the cases of appeal they are essentially proceedings by private individuals, and to which the crown is no party, and they are, therefore, like *qui tam* cases, and the argument derived from them is not applicable to cases like the present; but in the impeachment case it was not held a good plea. The defendant might have applied to have the indictment quashed, but the court will not quash an indictment for an Attorney-General, because he can enter a *nolle prosequi*, which has the same effect: *R. v. Dr. Wynne* (2 E. 226), *Goddard v. Smith* (6 Mod. 261.)

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BLACKBURNE, C. J.—To the first of these informations the plea Judgment. commences with stating that the court ought not to take cognizance of the offences therein specified, because an indictment was found in this court for the same offences, on which indictment he was, at the request of the Attorney-General, arraigned, and such proceedings were thereupon had that the Attorney-General came into court and said that he would not further prosecute the said John Mitchel, and that he should go thereof without delay (in mistake for day); the plea then avers that he is the person who was so indicted and arraigned, and that the offences in the indictment and information are the same: and he further saith, that he ought, according to the laws and customs of this realm, and the liberties and privileges of the subjects of this realm, to be free and exempt from being compelled to answer for the offences in the said information mentioned, before any justice or minister of our lady the Queen, or any other judge in any other court, except on indictment found or presentment made on the oaths of twelve lawful men of the body of the county, and this he is ready to verify, and prays if this court will or ought to take cognizance of the information aforesaid, and that he may be dismissed and discharged—there is no averment of the pendency of the indictment—the crown demurs, stating that the matters pleaded are not sufficient in law to preclude the Queen from proceeding on the said information against him, and concludes with praying judgment that the defendant may be convicted. This demurrer is objected to as being informal, and amounting to a discontinuance. On the other hand, the Attorney-General contends that the plea is itself bad, and if it be, that we are bound by the ordinary rule which obliges us to examine the whole record, and to adjudge according to the legal

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right as it may on the whole appear; the question then is this, is the plea of an indictment depending a bar to this information for the same matter? In support of the affirmative, that it is, there is neither precedent, the authority of any case, the dictum of any judge, or even the opinion of any text-writer: but, on the other hand, there are authorities that such a plea is utterly invalid. In *Sir William Withipole's case* (Sir W. Jones, Rep. 199), he was arraigned on a second indictment for murder; having pleaded to the first, he objected to plead to the second, and he was obliged to do so. In the same case, as reported in Cro. Charles, it is expressly said that this was no cause of plea, for when he is not acquitted or convicted he may be arraigned on a new indictment. It is true the court most properly quashed the first indictment to avoid any doubt, but this does not detract from the authority of the case, sustained as it is by a mass of other authorities to the same effect. In Hale's *Pleas of the Crown* (vol. 2, 221, 222), it is stated that if there be a finding of murder by the coroner's inquest and an indictment for the same murder, the course is to arraign him on the former, and if he be acquitted on that, to arraign him on the indictment, and put him to his plea of *autrefois acquit*; and Hale says, that in such cases, to avoid the trouble of this plea, he usually had the prisoner arraigned and tried on both indictments; so in 2 Hale's P. C. 239, it is expressly stated that if a man be arraigned on a second indictment for murder, it shall not abate, because it is the King's suit. He goes on and states the practice, as in page 222, of arraigning on both indictments, and giving him in charge on both of them. Hawkins is the next authority, in his chapter (34) on Pleas in Abatement, he says, "it has been holden that it is no good plea in abatement of an indictment, as it is of an appeal or information, that there is another indictment for the same offence; but in such case the court in discretion will quash the first indictment if any fault be found with it." This is a most explicit statement of the law, and it requires only a careful attention to the words of the section itself to see that the word *information* in this passage cannot mean information for a misdemeanor; but Hawkins, precisely in the margin, refers to the 63rd section of his 26th chapter on *qui tam* informations, which states, and shows by authorities, that to an information on a penal statute the pendency of a prior information for the same matter may be pleaded in abatement; there is, therefore, no manner of doubt that the passage from the 34th chapter is a distinct authority against this plea. The next is *Swan & Jefferies' case* (Foster, C. L. 105). It was decided in 1751 before Wright and Foster, justices, at the assizes; there was an indictment for murder, Swan being charged as principal, and Jefferies as aiding: they were arraigned and pleaded. Afterwards a second bill of indictment was preferred and found, charging Swan with petit treason, and Jefferies with murder; they were arraigned on the second indictment, and pleaded the pendency of the first, and to this the crown demurred; and in support of the plea it was argued that they might be tried, if acquitted on the second indict-

ment, a second time on the first, and would have no opportunity of pleading *autrefois acquit*: the court held that *autrefois arraign* was no plea. *Reg. v. Stratton* (Dougl. 240), was an information *ex officio*, to which the defendants pleaded and issue was joined. There was a motion by the Solicitor-General to quash the information, but another might be filed. This was opposed; the Solicitor-General argued that the defendants could sustain no injury by the quashing of the information, for that the crown could go on on the new information notwithstanding the pendency of the other, *for that on indictments and informations for crimes, the pendency of another indictment for the same offence cannot be pleaded as it may to informations or penalties*. Lord Mansfield said, if it was proper to stop the proceeding he did not see why the Attorney-General might not do so by entering a *nolle prosequi*; and Buller, J., says, "what the Solicitor-General has stated, viz., that the pendency of the first indictment would be no plea to the second, is decisive against this motion." Thus the court adopts, recognizes, the proposition that, in criminal proceedings, there can be no such plea as the present, and makes it one of the grounds of the rule. These authorities, in my opinion, show, without doubt, that the plea in the present case is bad. It has been contended, that because the present is the use of a criminal information filed by the Attorney-General, that the authorities which I have been considering, and of which the objects are indictments, ought not to govern it. That they should not do so would require what I have not heard, a reason or ground for making it an exception to the rule so clearly established. I cannot discover, in relation to that rule, a distinction between the use of a second prosecution by indictment and a second one by information. The argument which the plea suggests, that because his misdemeanor was in the first instance prosecuted by indictment, the Attorney-General could not afterwards proceed by criminal information, is one for which I cannot see any foundation, and, indeed, I cannot see how it could be made available by a party who had pleaded in abatement. I have only further to add on this part of the case, that even if the plea of a former prosecution depending could be pleaded, the entering of the *nolle prosequi* would be an answer to it, and this appears to have been plainly decided by the *King v. Stratton*, in Douglas's Rep. I am, for these reasons, clearly of opinion that this is a bad plea. I have already stated that it is not warranted by precedent or authority, and with the authorities of Hale, Holt, Hawkins, Foster, Lord Mansfield, and Judge Buller against it, I shall not sanction its addition to the number of dilatory pleas. But it is now necessary to advert to an objection that has been made to the demurrer of the crown: it is this, that the plea being in abatement, it concludes with praying judgment, not of *respondeas ouster*, but of conviction; and this is founded on the authority of cases collected in 2 Saunders, 210, and especially of *Bisse v. Harcourt*, there cited. These are all cases of civil actions. It is plain that a party pleading in abatement cannot call on the court to pronounce such judgment only as his

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plea demands: *The King v. Shakspeare* (10 E. 363.) But the question now to be considered in one of these informations is, whether the prayer of judgment of conviction by the demurrer in the first of these cases, and the replication in the other, is a discontinuance of the suit of the crown, and precludes us from giving judgment for the crown. Without deciding the point, I think it is very questionable whether in pleading there can be on the part of the crown a discontinuance: no case has been cited in which it has been decided that there can; there are two cases that appear to decide that there cannot: (Com. Digest, Pleader Discontinuance, W. 2.) In the *Attorney-General v. Farnham* (Hard. 504), upon a *quo warranto* information, issue was joined on a question whether the corporation had toll by prescription; it was found for the defendant. There was a motion in arrest of judgment, on the ground of a discontinuance, there not having been issue joined as to other liberties claimed: the Chief Baron said they came too soon to urge that, because judgment was not yet given, and before judgment there is no discontinuance in the King's case, for the Attorney-General may still proceed by the King's prerogative, to take issue on the rest, or may enter a *nolle prosequi*: *Rex v. Griffith* (1 Rolle, Abr. 486), was a *scire facias*, on a recognizance. The defendant imparled, and a day was given to him, but not to the plaintiff (the crown). This is not a discontinuance, because the King is the party; and where the King is a party, no day is given to him, because he is at all times present in court. But suppose that there may be, what is technically, a discontinuance, we are now to consider how the precedents and authorities are. It is to be observed, that where issue in fact is taken in pleas in abatement, in indictments for misdemeanors, they should always conclude with a prayer of final judgment for them, for if the fact be found for the crown the judgment must be final; the judgment cannot be of *respondeas ouster*: *Rex v. Shakspeare* (10 E. 83.) As to precedents of demurrers to pleas in abatement, I believe they are in both ways, sometimes in bar, sometimes in abatement; we have precedents in 4 Chitty, Cr. L. and *Foxwist v. Tremaine* (2 Saunders, 110), and *Reg. v. O'Connell*, all concluding with a prayer of final judgment. The authorities, *Rex v. Taylor*, and *Lug v. Goodwin*, are, however, quite decisive that the informality of the prayer of the demurrer is no ground of objection, or that the court is thereby precluded from giving the right judgment on the whole matter. Another authority has been supplied by Mr. Justice Crompton, *The King v. Taylor* (5 B. & C. 302); this was an indictment for keeping a gaming-house; plea, that the defendant was indicted for keeping a gambling-house, and acquitted, and that the offences are the same. There was a demurrer to this, concluding with a prayer of judgment of *respondeas ouster*; this plea was held bad, then the question arose, what judgment the crown could have, the plea having been a plea in bar. Lord Tenterden said, "The court is not bound by the prayer with which any part of the pleadings in bar may conclude, but is to give such judgment on a plea in bar as by law

ought to be given. This was settled in *Le Bret v. Papillon* (4 E. 502), and *The King v. Shakspeare* (10 E. 83), if the demurrer in this case had concluded by a prayer of a judgment, that the defendant be convicted, yet the court would only have given a judgment to answer over if the latter had been the proper judgment. We are, therefore, to consider the question as a matter of law, entirely independent of the particular prayer that has been entered on the record," and final judgment was given for the crown. *Lug v. Goodwin* (1 Ld. Ray. 393), was a *scire facias*; there was a plea in abatement, the plaintiff demurred in bar, there was judgment of *respondeas ouster*, the defendant then pleaded the same matter in bar, and the plaintiff demurred. Carthew objected the discontinuance, because the demurrer had concluded in bar, "*sed non allocatur*, for when the defendant pleads a good plea in abatement, and the plaintiff replies new matter, he ought to maintain his suit; but if the defendant pleads an ill plea, though the plaintiff replies, and concludes in bar, it is not material." These cases are authorities for holding, as we do, that we are bound to give judgment on the whole record, and that, the plea being bad, the crown is entitled to judgment. In the second information in which the defendant has demurred to the replication of the crown, we think that there should also be judgment for the crown: the same arguments and authorities apply to it as to the first; but as to the objections to the form of the replication, it is manifest they are all plainly of no moment, if the plea be, as I think it is, bad. But as to the objection to the replication, that it prays judgment of conviction, and not of *respondeas ouster*, it is to be observed, that the replication introduces matter on which issue may be taken, and I apprehend that by doing so, the crown was entitled to pray final judgment, as that to which it might be entitled, if issue were joined, and the fact found for it. The case of *Bonner v. Hall* (1 Ld. Raym. 338), is an important authority on this point, and is the more so because it shows that the case of *Bisse v. Harcourt*, so much relied on by the defendant, is put by Lord Holt on its true ground,—a ground on which it is expressly distinguished from both the cases which are before us. It will be seen from the report of it, that there was judgment for the defendant Harcourt, because he had pleaded a good plea. In the present case, we are of opinion that the plea in abatement is utterly bad. Now the case of *Bonner v. Hall* was this: "In *indebitatus assumpsit* the defendant pleaded in abatement another action depending in *curia nostra de C. B.* for the same cause;" the plaintiff said there was not any action depending for the same cause, not calling for judgment of *respondeat ouster*, but calling for judgment of debt and damages: the defendant demurred, the plaintiff joined, and concludes rightly, and it was admitted that the plea was ill, because he pleads a cause depending in his court of C. B., and for other reasons. The plea being ill, the plaintiff fell "back on it,"—just what they have done here—but then it is said "Mr. Ward moved that there was a discontinuance," and the case of *Bisse v. Harcourt* was relied on; but, per Holt, C. J., "this case

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differs from the case of *Bisse v. Harcourt*, for there the plea was good, and then when the plaintiff replied new matter to maintain his writ, then he should have made his conclusion accordingly. But where the plaintiff traverses the defendant's plea in his replication, and offers an issue, he may pray judgment *de debito et damnis*, because, if it be tried, peremptory judgment ought to be given; but in this cause, the first fault is in the defendant, for the plea is ill, and therefore judgment was given *quod respondeat ulterius*." Now, on all the parts of this case, I have stated my opinion, and it is not my opinion, but I have stated the authorities, and all doubt on the subject is closed by them.

CRAMPTON, J.—I fully concur in all that has fallen from my Lord Chief Justice.

Judgment of *respondeat ouster*.

The *Attorney-General* then having moved that the defendant be ordered to plead over forthwith, he immediately pleaded not guilty.

Note.—Though days were subsequently fixed for the trial of the issues joined in each of the above cases, and special jury panels balloted for, and reduced for the trial of each, the proceedings were abandoned, the defendant having been subsequently committed to Newgate, upon a charge of felony, under the Crown and Government Security Act, upon which charge he was afterwards, before the days fixed for his trial in this court, tried at the commission of oyer and terminer and general gaol delivery for the county of the city of Dublin, convicted and sentenced to transportation: (see 3 Cox's Crim. Cas. 35.)

CENTRAL CRIMINAL COURT.

AUGUST SESSION.—August 26.

(Before MR. BARON PLATT.)

*Re CROWE. (a)**Sedition—Indictment—Setting out seditious matter continuously.*

An indictment for sedition alleged "that the defendant, amongst other words and matter, uttered the words and matter following," and then set out several sentences as though they had been uttered continuously. The evidence showed that they had not been so uttered, but that the sentences had been selected from different parts of the speech, other matter intervening between them.

Held, that there was no variance, and that if any portions of the speech omitted, varied, or controlled the sense of those parts that were set out, the onus was upon the defendant to show it.

THE prisoner was charged with sedition on the following indictment:—

Central Criminal Court, to wit:—The jurors for our lady the Queen, upon their oath, present that Robert Crowe, late of the parish of St. George, in the county of Middlesex, labourer, otherwise called Robert Crome, being a wicked, malicious, seditious, and evil-disposed person, and wickedly, maliciously, and seditiously contriving and intending the peace of our said lady the Queen and this realm to disquiet and disturb, and the liege subjects of our said lady the Queen to incite and move to hatred and dislike of the person of our said lady the Queen, and of the Government by law established within this realm, and to incite, move, and persuade great numbers of the liege subjects of our said lady the Queen to insurrections, riots, and rebellion, and to prevent by force and arms the execution of the laws of this realm, and the preservation of the public peace, on the 31st day of July, in the year of our Lord 1848, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, in the presence and hearing of divers, to wit, two hundred of the liege subjects of our said lady the Queen then and there assembled, in a certain speech and discourse by him the said Robert Crowe, otherwise called Robert Crome, then and there addressed to the said liege subjects, so then and there assembled as aforesaid, unlawfully, wickedly, maliciously, and seditiously did publish, utter, pronounce, and declare with a loud voice, of and concerning the Government by law established within this realm, and of and concerning our said lady the Queen and the crown of this realm, and of and concerning the liege subjects of our said

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lady the Queen, committing and being engaged in divers insurrections, riots, and breaches of the public peace, amongst other words and matters, the false, seditious, and inflammatory words and matters following, that is to say:—"The late insurrection in Paris has shown how easy a crown can be crumbled. Now is the time to be brave! Now is the time to be resolute and the game's our own. I (thereby meaning the said Robert Crowe, otherwise called Robert Crome,) do not care for those persons present who wear other people's clothes; I (thereby meaning the said Robert Crowe, otherwise called Robert Crome,) do not care if what I (thereby meaning the said Robert Crowe, otherwise called Robert Crome,) say is criminal. I (thereby meaning the said Robert Crowe, otherwise called Robert Crome,) shall do all in my power during the next week to put a stop to trade, and urge the Irishmen in London to a rebellion,"—in contempt of our said lady the Queen, in open violation of the laws of this realm, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lady the Queen, her crown and dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Crowe, otherwise called Robert Crome, together with divers other evil disposed persons, to the number of two hundred and more, to the jurors aforesaid unknown, afterwards, to wit, on the day and in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully, riotously and routously did assemble and gather together, to disquiet and disturb the peace of our said lady the Queen, and to raise insurrections, riots, tumults, and disturbances within this realm, and to obstruct, by force and arms, the execution of the laws of this realm, to the great disturbance and terror not only of the liege subjects of our said lady the Queen, then and there being and residing, but of all other the liege subjects of our said lady the Queen then passing and repassing in and along the Queen's common highway there, in contempt of our said lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lady the Queen, her crown and dignity.

On the speech delivered by the defendant on the occasion in question being read in evidence, it appeared that the sentences set out in the indictment had not been delivered continuously, but that they had been selected from the whole discourse, and that other matter intervened between them.

Parry (*Thompson* with him), for the defendant, objected that this was a variance which vitiated the whole indictment. That instrument professed to give the matter set out as what was uttered by the defendant, whereas it turned out that what he did say was totally different. It would be easy to take any speech, and, selecting from it various words, make up sentences which conveyed a totally opposite meaning to what the speaker intended. He might be said to have uttered the words, but certainly not the

sentiments. So here, the part of the speech omitted might have materially qualified the part set out. The case of *Tabart v. Tipper* (1 Camp. 350), showed that where words were set out as these were, they must be assumed to have been continuous. There Lord Ellenborough said, "The libel is set out as if it were an entire and continuous part of the book from which it was taken. But in fact it consists of two separate and distinct parts of the book. The declaration proposes to do one thing and does another. The more correct way would have been to say, 'In a certain part of which said libel there was and is contained,' " &c.

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Welsby (with him the *Attorney-General*, *Bodkin*, and *Clerk*), for the prosecution, submitted, in the first place, that the indictment did not purport to set out all that was uttered on that occasion by the defendant. It alleged that he uttered, among other words and matter, the words and matter following; so that it was clear on the face of the indictment that a selection had been made. But, secondly, even if the court was of opinion that the sentences must be presumed to have been uttered continuously, the last sentence was sufficient to sustain the indictment, and the rest might be rejected as surplusage.

PLATT, B.—I find, on referring to the case of *Tabart v. Tipper*, that Lord Ellenborough goes on to say, "However, in this instance, the sense is not altered by the passage omitted. If it had, I should have directed a nonsuit." So that, in fact, the decision was against the view here contended for by the defendant's counsel; for the case was, in spite of the alleged variance, still left to the jury. I think, therefore, that there is no valid objection here on the score of variance; but that if the matter omitted does control or vary the meaning of that which is alleged, it is for the defendant to show it.

Parry submitted that at all events the counsel for the prosecution should elect on which sentence they would rely.

PLATT, B.—I think not. The onus is upon you to prove that the sense attributed to the words by the indictment is varied by anything beyond it.

CENTRAL CRIMINAL COURT.

JUNE SESSION, 1848.

June 15.

Re CLAPTON. (a)*Embezzlement.*

Where there has been a written agreement between master and servant, in which the nature of the service is defined :

Held, on an indictment for embezzlement against the latter, that parol evidence of the service was inadmissible, unless notice had been given to produce the agreement.

Re CLAPTON.
—
Embezzlement.

THE prisoner was indicted for embezzlement. The prosecutor stated that the accused was in his employ; that the nature of his employment had been inserted in a memorandum prior to his giving a bond; that the memorandum was signed by both parties, and that the prisoner took it away with him.

No notice to produce the memorandum had been given.

Ballantine, for the prisoner, contended that it was not competent for the prosecution to give evidence of the nature of the service without producing the agreement or proving that notice to produce it had been given.

Parry, for the prosecution, submitted that he was not bound to produce the agreement; the terms of it were quite immaterial to the present issue. The simple question was, whether the prisoner had been servant, and not what were his duties as such. The one was a mere matter of fact, viz., what had been done? The other was, what was agreed to be done?

Ballantine replied.

PATTERSON, J.—To substantiate this charge, it is essential that the money should have been received by the prisoner, by virtue of his employment. It appears there has been an agreement between these parties, in which the prisoner's duty was defined; and if so, he received this money by virtue of an employment, the nature of which is contained in a written instrument. That instrument ought to be produced, or notice to produce it should have been given. There is nothing to take the case out of the general rule that you cannot give parol evidence of the contents of any written agreement, otherwise we should fall into that great difficulty, the fallacy of human recollection. I remember two or three unreported cases tried at Warwick—one before Mr. Justice Coleridge—in which it was held that under such circumstances the agreement must be produced.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

CENTRAL CRIMINAL COURT.

MARCH SESSION, 1848.

March 2.

(Before POLLOCK, C. B., and COLTMAN, J.) (a)

REG. v BROWN.

Indictment under 6 & 7 Will. 4, c. 86—Withdrawing plea for the purpose of demurring—Evidence.

Where a defendant had pleaded inadvertently to an indictment under circumstances which might show it to have been a mistake on his part, the court refused to allow him to withdraw his plea for the purpose of demurring, where the objection was one of a technical character, not in any way affecting the merits of the case.

On an indictment under the 41st section of the 6 & 7 Will. 4, c. 86, the indictment alleged that a certain clergyman had duly solemnized a marriage between the defendant and another person, and that he was about to register in duplicate, in certain marriage register books, furnished to him for that purpose by the Registrar-General, several particulars required to be known, relating to such marriage, and that the defendant wilfully made to the said clergyman for the purpose of being inserted in the said marriage register books, certain false statements, touching the particulars relating to the said marriage. The evidence showed that the entry had been made before the marriage, by the parish clerk, who put the questions to the defendant, and wrote down the answers in the absence of the clergyman, but that after the marriage ceremony was performed, the clergyman read over the whole entry to the defendant, and asked him if it was correct, to which he answered in the affirmative.

Held, that the evidence was sufficient to support the indictment.

Held, also, not necessary to prove that the marriage register books had been furnished to the clergyman by the Registrar-General.

THE prisoner was indicted under the 41st section of the 6 & 7 Will. 4, c. 86, and the indictment stated, that before and at the time of the committing of the offence, in this count mentioned, a certain district church called Trinity Church, situate and being in the parish of Saint Marylebone, in the county of Middlesex, and within the jurisdiction of the Central Criminal Court, was a church in England wherein marriages might be lawfully solemnized between any person or persons dwelling within the same district and parish, to wit, at the parish of Saint Marylebone, in the county of Middlesex, and within the jurisdiction of the said court.

That before and at the time of the committing of the offence

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in this count mentioned, one William Frederick Hamilton, clerk, was a clergyman of the church of England, and curate of the said district church called Trinity Church, and as such clergyman and curate was, by a certain act of Parliament in that case made and provided, required, immediately after the solemnization by him of every office of marriage between persons in the said church, to register in duplicate, in certain marriage register books furnished to him for that purpose, several particulars required to be known, relating to such marriage, that is to say, the day of the month and year when such marriage was solemnized, the name and surname of the man and woman between whom such marriage was solemnized, the age, condition, and rank or profession of the man and woman between whom such marriage was solemnized, the residence at the time of marriage of each of them the said man and woman between whom such marriage was solemnized, and the surname and rank or profession of the father of each of them the said man and woman between whom the said marriage was solemnized, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court. That before the committing of the offence in this count mentioned, and after the first day of March, A. D. 1837, to wit, on the 19th day of June, A. D. 1847, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, the said William Frederick Hamilton, so being such clergyman and curate as aforesaid, had in the said district church called Trinity Church, in the parish of Saint Marylebone aforesaid, in the county aforesaid, solemnized the office of marriage between Samuel Brown, late of Tring, in the county of Hertford, labourer, and one Esther Field, late of the same place, spinster, and immediately after the solemnization of the said office of marriage between the said Samuel Brown and Esther Field, by him the said William Frederick Hamilton as aforesaid, to wit, on the day and year aforesaid, in the parish and county first aforesaid, and within the jurisdiction of the said court, he the said William Frederick Hamilton, as such clergyman and curate who had so solemnized the said office of marriage between the said Samuel Brown and Esther Field, as aforesaid, was about to register in duplicate in the said marriage register books so furnished to him as aforesaid, the particulars relating to the said marriage between the said Samuel Brown and Esther Field, according to the form of the statute in that case made and provided, of all which said several premises the said Samuel Brown before and at the time of the committing of the offence in this count mentioned, had notice, to wit, at the parish aforesaid in the county first aforesaid, and within the jurisdiction of the said court. That the said Samuel Brown, well knowing the premises, but unlawfully contriving and intending to cause to be inserted in the said marriage register book, divers false statements of certain of the particulars by the said act of Parliament required to be known and registered, relating to the said marriage of him with the said Esther Field, so had and solemnized as aforesaid, and after the

passing of the said act of Parliament, and after the first day of March, A. D. 1837, to wit, on the 19th day of June in the year aforesaid, at the parish and county first aforesaid, and within the jurisdiction of the said court, with force and arms, &c., did unlawfully, wilfully, and knowingly make to the said William Frederick Hamilton, so being such clergyman and curate as aforesaid, and so having solemnized the said office of marriage between the said Samuel Brown and Esther Field as aforesaid, for the purpose of being inserted in the said register of marriage in the said marriage register book, of marriages solemnized at the said church, certain false statements touching certain particulars relating to the said marriage of the said Samuel Brown and Esther Field, which by the said statute were required to be known and registered, that is to say, that she the said Esther Field was at the time of the solemnization of the said marriage between her and the said Samuel Brown as aforesaid, of full age, and that the residence of him the said Samuel Brown at the time of his said marriage with the said Esther Field as aforesaid, was 31, Wimpole-street, meaning thereby a certain house No. 31, in a certain street called Wimpole-street, situate in the district of the said church, in the parish of Saint Marylebone, in the county of Middlesex, and that the residence of her the said Esther Field at the time of her said marriage with the said Samuel Brown as aforesaid, was Wimpole-street, meaning thereby Wimpole-street aforesaid, in the district and parish aforesaid, in the county of Middlesex, by means whereof the said William Frederick Hamilton, so being such clergyman and curate as aforesaid, and so having solemnized the said office of marriage between the said Samuel Brown and Esther Field as aforesaid, and so being required to register the particulars relating to such marriage as aforesaid, believing the statements of the said Samuel Brown to be true, and not knowing to the contrary thereof, did then and there, to wit, on the day and year aforesaid, at the parish first aforesaid, and within the jurisdiction of the said court, insert in the said marriage register book, in the register of marriage of the said Samuel Brown with the said Esther Field as aforesaid, and for particulars relating to the said marriage of the said Samuel Brown with the said Esther Field required to be known by the said statute as aforesaid, that the said Esther Field was at the time of the solemnization of the said marriage between her and the said Samuel Brown as aforesaid, of full age, and that the residence of him the said Samuel Brown, at the time of his said marriage with the said Esther Field as aforesaid, was 31, Wimpole-street, in the district and parish aforesaid, and that the residence of her the said Esther Field at the time of her said marriage with the said Samuel Brown as aforesaid, was Wimpole-street, in the district and parish aforesaid. Whereas, in truth and in fact, the said Esther Field was not, at the time of the solemnization of the said marriage between her and the said Samuel Brown as aforesaid, of full age, but was at that time under full age, to wit, of the age of eighteen years only and no more; and the said Samuel

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Brown, at the time he so made the said false statement to the said William Frederick Hamilton as aforesaid, touching the particulars of the age of the said Esther Field as aforesaid, then and there knew the same. And whereas, in truth and in fact, the residence of him the said Samuel Brown, at the time of his said marriage with the said Esther Field as aforesaid, was not 31, Wimpole-street, in the district and parish aforesaid; and the said Samuel Brown, at the time he so made the said false statement to the said William Frederick Hamilton as aforesaid, touching the residence of him the said Samuel Brown as aforesaid, then and there well knew the same. And whereas, in truth and in fact, the residence of her the said Esther Field, at the time of her said marriage with the said Samuel Brown as aforesaid, was not Wimpole-street, in the district and parish aforesaid; and the said Samuel Brown, at the time he so made the said false statement to the said William Frederick Hamilton as aforesaid, touching the residence of the said Esther Field as aforesaid, then and there well knew the same, to wit, at the parish aforesaid, in the county first aforesaid, and within the jurisdiction of the said court, contrary to the form of the statute in such case made and provided, to the evil and pernicious example of all others in the like cases offending, and against the peace of our sovereign lady Queen Victoria, &c.

Second Count.—That before and at the time of committing of the offence in this count after-mentioned, the district church of Trinity, in the parish of St. Marylebone, was a church wherein marriages might be lawfully solemnized, after the passing of a certain act of Parliament made and passed in the session of Parliament holden at Westminster, in the county of Middlesex, in the sixth and seventh years of the reign of our late sovereign lord King William the Fourth, for registering births, deaths, and marriages in England, and after the 1st day of March, A.D. 1837; and that one William Frederick Hamilton, clerk, was curate of the said district church, and lawfully authorized to solemnize the office of marriage in the said district church between persons to be married therein, and to register, in the marriage register books furnished to the rector, vicar, or curate of the said church by the Registrar-General, all the particulars relating to such marriages as were so solemnized by him according to the form by the said act of Parliament required, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court.

That after the passing of the said act of Parliament, and after the 1st day of March, A.D. 1837, and immediately before the committing of the offence in this count after-mentioned, to wit, on the 19th day of June, A.D. 1847, the office of marriage had been solemnized by the said William Frederick Hamilton, so being such curate, and lawfully authorized to solemnize, in the said district church as aforesaid, and to register such marriage as aforesaid, between the said Samuel Brown and the said Esther Field, to wit, at the parish aforesaid, in the county first aforesaid, and within the jurisdiction of the said court.

That the said Samuel Brown, well knowing the premises in this count mentioned, did then and there, and immediately after the solemnization of the said marriage between him and the said Esther Field as aforesaid, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county first aforesaid, and within the jurisdiction of the said court, with force and arms, &c., unlawfully, knowingly, wilfully, corruptly, and falsely make certain false statements to the said William Frederick Hamilton, so being such curate, and having such lawful authority as aforesaid, touching certain of the particulars by the said act of Parliament required to be known and registered, touching and concerning the said marriage and the age of the said Esther Field, and the respective residences of him the said Samuel Brown and her the said Esther Field, for the purpose of the same false statements being inserted by the said William Frederick Hamilton, as such curate and officiating minister as aforesaid, in the marriage register books of the said district, (that is to say, a statement that the said Esther Field was, at the time of the solemnization of the said marriage in the said district church as aforesaid, of full age; and a certain other statement that the residence of him the said Samuel Brown, at the time of the solemnization of his said marriage with the said Esther Field as last aforesaid, was 31, Wimpole-street; and a certain other false statement, that the residence of her the said Esther Field, at the time of the solemnization of her said marriage with the said Samuel Brown as last aforesaid, was Wimpole-street. Whereas, in truth and in fact, the said Esther Field was not, at the time of the solemnization of the said last-mentioned marriage, of full age, but was at that time under age, as the said Samuel Brown, at the time when he so made the said false statement respecting the age of the said Esther Field as last aforesaid, then and there well knew. And whereas, in truth and in fact, the residence of him the said Samuel Brown, at the time of the solemnization of the said last-mentioned marriage, was not 31, Wimpole-street, as he the said Samuel Brown, at the time when he so made the said false statements respecting the residence of him the said Samuel Brown as last aforesaid, then and there well knew. And whereas, in truth and in fact, the residence of her the said Esther Field, at the time of the solemnization of the said last-mentioned marriage, was not Wimpole-street, as he the said Samuel Brown, at the time when he so made the said false statement respecting the residence of her the said Esther Field as last aforesaid, then and there well knew, contrary to the form of the statute, &c., to the evil and pernicious example, &c., and against the peace, &c.

Third Count.—That after the making and passing of the said act of Parliament in the second count mentioned, and on the 19th day of June, in the year last aforesaid, at the parish aforesaid, in the county first aforesaid, and within the jurisdiction of the said court, the said Samuel Brown, with force and arms, &c. did wilfully, knowingly, corruptly, and unlawfully make, for the purpose of being inserted in the register of marriage aforesaid a false statement touching the particulars required by the said act of Parliament to be

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known and registered touching the marriage of him the said Samuel Brown with the said Esther Field, against the form of the statute, &c., to the evil and pernicious example, &c., and against the peace, &c.

Fourth Count.—That after the making and passing of the said act of Parliament in the second count mentioned, and on the 19th day of June, in the year last aforesaid, at the parish aforesaid, in the county first aforesaid, and within the jurisdiction of the said court, the said Samuel Brown, with force and arms, &c. did wilfully, knowingly, corruptly, and unlawfully make, for the purpose of being inserted in a register of marriages, a certain false statement touching certain of the particulars by the said act of Parliament required to be known and registered touching marriages, against the form of the statute, &c., to the evil and pernicious example, &c., and against the peace, &c.

The following are the parts of the sections of the act of Parliament on which the argument hereinafter mentioned principally turned:—

Statute.

The 30th section enacts, that the Registrar-General shall furnish or cause to be furnished to the rector, vicar, or curate of every church and chapel in England wherein marriages may lawfully be solemnized, &c. a sufficient number in duplicate of marriage register-books and forms for certified copies thereof, as hereinafter provided, &c.

The 31st section enacts, that every clergyman of the Church of England, immediately after every office of matrimony solemnized by him, shall register in duplicate, in two of the marriage register-books, the several particulars relating to that marriage, according to the form of the said schedule (C.), &c. And every such entry shall be signed by the clergyman, and by the parties married, and by two witnesses, &c.

The 40th section enacts, "that it shall be lawful for every clergyman of the Church of England who shall solemnize any marriage in England, to ask of the parties married the several particulars herein required to be registered, touching such marriage."

The 41st section enacts, "that every person who shall wilfully make or cause to be made, for the purpose of being inserted in any register of birth, death, or marriage, any false statement touching any of the particulars herein required to be known and registered, shall be subject to the same pains and penalties as if he were guilty of perjury."

The defendant had pleaded to the indictment at the previous sessions, and now

Sir Frederick Thesiger (with whom were *Clarkson* and *Ballantine*), moved the court on his behalf, that he might be allowed to withdraw his plea of not guilty to the third and fourth counts, for the purpose of demurring them. He had been suddenly called upon to plead at the last session, when neither his counsel nor attorney was present. It had, in fact, been arranged between the counsel on both sides that the case should stand over, and it was supposed that he would not be brought up, but it happened that

he was placed at the bar, and the officer of the court finding him there, said, "you may as well plead now," and he did so. In *R. v. Purchase*, 1 Car. & Mar. 617, the court allowed a defendant to withdraw his plea under similar circumstances, and in *R. v. Odgers*, 2 Moo. & Rob. 479, although Mr. Justice Cresswell refused such an application, the objection to the indictment being one of the merest technicality, his lordship at the same time said, "it is, however, clearly in the discretion of the judge whether a prisoner shall be allowed to withdraw his plea, and I think that for the purpose of substantial justice, such withdrawal should be allowed, but not for a mere technical objection like this."

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POLLOCK, C. B.—Then you must show the court that your objection is a substantial one.

Sir F. Thesiger said, his objection was that the counts in question were bad in not setting out in what particulars the defendant stated falsely.

POLLOCK, C. B.—If that is so, you may have the benefit of the objection hereafter.

Sir F. Thesiger was not sure that that would be so. It might be that the count would be good after verdict, though not before, because, as the allegations follow precisely the provisions of the statute, the want of particularity might be cured by the 7 Geo. 4, c. 64.

POLLOCK, C. B.—My difficulty is this, that you are seeking to introduce into the criminal law the distinction between general and special demurrers. If your objection is to the substance, you may take advantage of it in arrest of judgment; it is only in case of its being a technical one that it will be cured by verdict.

Sir F. Thesiger was not prepared to decide what was the precise character of the objection, he only felt that the defendant might be prejudiced by the course that had been taken; he had been surprised into pleading when he was without any legal assistance whatever, and it was only a matter of justice to place him in the same position he was in before. This case was analogous to a case of perjury or one of false pretences, where it was necessary to allege not only the material facts constituting the offence, but to negative the truth of each particular allegation. And an indictment stating the offence in a general form would surely be bad in substance.

POLLOCK, C. B.—We are of opinion that the trial ought to proceed, and that the defendant ought not to be allowed to demur. It is admitted that unless the count is bad the application cannot succeed. But it is a mistake to say that the count is bad. The plea of not guilty has made it good; and being a good count at the time of this application, we are asked to turn it into a bad one to accommodate the defendant. But then, is there any substantial inconvenience to which the defendant is subjected, because, if there is, it would, no doubt, be our duty to remedy as far as possible any injury he may have sustained by an inadvertent plea. Now the objection to the counts in question is that they are too

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general, and if it appeared that the defendant was really ignorant of the particulars of the charge against him, we would take care that he should be properly informed upon the subject before his trial. But it is not even suggested that this is so. If the general form of the counts rendered a less amount of evidence sufficient to sustain it, that again would be reasonable ground of complaint, but it is plain that all the evidence that would be required under the most special count that could be framed, must be given under this general one. Failing, therefore, to perceive that the defendant has been prejudiced by what was done, we decline to interfere.

COLTMAN, J., assented.

In support of the charge the clerk of Trinity Church, Marylebone was called; he said, "I attended at the church on the 19th of June, when the defendant and Esther Field attended for the purpose of being married. I produce the register book of marriages, there is an entry of the 19th of June, in my writing. It was made in the vestry before the marriage was solemnized. I asked various questions of the defendant, the answers to which I inserted in the book. Mr. Hamilton, the curate, was not present when I made those entries, but he came in two or three minutes afterwards. The party then adjourned into the church, and the ceremony was gone through—Mr. Hamilton officiating; I heard him read over the entry to the parties afterwards, and they assented to its accuracy. The clergyman then signed the book, and the defendant and the lady signed it afterwards. I and my wife then signed it as witnesses."

Thesiger, at the close of the case for the prisoner, objected in the first place that there had been no proof of the book in which the entries were made having been provided by the Registrar-General, and this was rendered essential by the 30th section of the statute. Secondly, as to the two first counts, they alleged that the defendant made certain false statements to the clergyman, for the purpose of their being inserted in the register, whereas the evidence proved that the entries were made by the clerk, and inserted in the register before the marriage.

POLLOCK, C. B., overruled the objection, and stated his opinion that in point of law there was no insertion in the register until it was signed by the clergyman; but he consented to reserve the point.

April 30.

Before LORD DENMAN, C. J.; WILDE, C. J.; POLLOCK, C. B.; PARKE, B.; PATTESON, J.; COLTMAN, J.; ROLFE, B.; WIGHTMAN, J.; CRESSWELL, J.; ERLE, J.; PLATT, B.; and WILLIAMS, J.

Case reserved.

Sir F. Thesiger (with whom was *Ballantine*), for the prisoner, said, that he was in some difficulty as regarded one of the points which he had wished should be reserved, but which was not reserved

by the case. It was as to the application he had made at the trial that the defendant should be permitted to withdraw his plea.

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LORD DENMAN, C. J.—How could that point be reserved? What authority have we to review a decision which was one peculiarly for the discretion of the presiding judge?

6 & 7 Will. 4,
c. 86.
—
Case reserved.

POLLOCK, C. B.—I had no intention of reserving that point. My brother Coltman and I decided it without entertaining the least doubt upon the subject.

Sir F. Thesiger.—This is an indictment under the 40th and 41st sections of the 6 & 7 Will. 4, c. 86. The first objection is that there was no proof given that the marriage register books in which the entry was made had been provided by the Registrar-General. Now that was essential to complete the proof against the prisoner. The object of the act of Parliament was to secure an accurate register of marriages throughout the kingdom (he read the 30th, 31st, 40th, and 41st sections of the act). The first of those sections required that certain books should be provided by the Registrar-General, and the 41st especially refers to entries to be made in such books. The clergyman is empowered to put certain questions to the parties for the purpose of insertion—not in any book that he may think proper, but in that book alone which the Legislature has specified. The indictment charges the defendant with making a false statement for the purpose of its being inserted in that precise book. Unless there is such a book there cannot be such a purpose, and no offence can be committed. Proof then of it being duly provided in accordance with the act is an essential part of the evidence. Looking at the intention of the framers of the act, this is the only reasonable construction of it, for they make that book the only record, the only authentic document of what they wish preserved.

WILDE, C. J.—Suppose the prisoner had made a false statement in answer to a question, and that the clergyman refused to enter it, believing it to be false. Would not that be an offence?

Sir F. Thesiger.—Probably it might. I do not mean to deny that an offence might be committed, although there was in fact no entry, but the statement must be made with the intent that it should be entered in the proper book, and there is no book here to which such an intention could apply. Secondly, the allegations in the indictment are, that a marriage had been solemnized by Mr. Hamilton; that it was his duty, after such solemnization, to make certain entries, &c., and that the prisoner made false statements for the purpose of their being so entered. The duties of the clergyman are prescribed by the 31st section of the act. He is to register the particulars required in the duplicate books immediately after the ceremony; the entry is then to be signed by him, by the parties married, and by two witnesses. By that section the duty of making the entry is imposed upon the clergyman himself. To enable him to do so the 40th section

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6 & 7 Will. 4,
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—
Case reserved.

gives him authority to ask the necessary questions. This 40th section points out the time at which the questions are to be asked, for they are to be put to the parties married—not to parties about to be married. Coupling then the 40th with the 41st section, as containing what the duty of the clergyman is, and the time at which it commences, it is clear that the false statement which is to be the subject of punishment is one to be made to the clergyman by the parties who have been married on an application made to them by the clergyman himself. No other person has authority to put these questions. I do not mean to carry my proposition so far as to argue that if after the marriage has taken place, the clerk, in the presence of the clergyman and by his authority, were to put the questions, that that would not be a compliance with the act. In the case of *R. v. Spalding*, 1 Car. & Mar. 568, Patteson, J. held, that where a town-clerk, in the presence and under the authority of the returning officer, put a question to a voter to which a false answer was given, that was equivalent to a questioning by the returning officer himself. But suppose in that case that as the voter was coming to the poll he had been met by a person who produced a paper with the questions written down; that the questions were put to him, the answers written, and the paper then had been taken to the returning officer, who, instead of asking the questions of the voter, read the contents of the paper to him, and asked him if it was correct. If the voter answered yes, could he be indicted?

WILDE, C. J.—He could not be said to have given a false statement.

Sir F. Thesiger.—It would have been a false answer to the question put to him.

WILDE, C. J.—But that is not the offence here charged. It is the having made a false statement.

Sir F. Thesiger.—If I am correct in my construction that no person but the clergyman has the power to make the specified inquiries, and that the statement must be made after the marriage ceremony has been performed, then any statement which has been before marriage cannot be within the act of Parliament, and there is no other statement here. The putting the questions before or after marriage may make a great difference in the conduct of the individual; he may have an interest in falsely answering before the marriage has taken place, he can have none afterwards; perhaps, in this case, had the questions been put to him after the ceremony, he might have given very different answers. What authority had the clerk to put the questions in the clergyman's absence. It is he that has made the entry.

POLLOCK, C. B.—But can there be said to be any entry until the clergyman has signed it?

Sir F. Thesiger.—His signature alone would not make it a proper entry, unless the other requisites had been complied with. He reads out from an entry, which had been previously made by an unauthorized person, certain particulars; he asks, "is that

correct?" the defendant answered in the affirmative, and for that answer he is arraigned. How could that answer have been given for the purpose of being inserted? The act does not say "with a view to its being entered" or "for the purpose of being registered," but "for the purpose of being inserted." It was never contemplated by the act, nor intended by the defendant, that such an answer should be inserted in the register. Suppose this case: there is an indictment for obtaining goods under false pretences, and it turns out that the accused is already in possession of the goods, but he tells a falsehood for the purpose of retaining the possession. Surely such an indictment would not lie. So the defendant here knows that the entry is already made, and, therefore, his object is, not that it should be made, but merely that it should be retained. The simple question is, whether this false statement can be said to have been made for the purpose of being inserted in the register, when the insertion has taken place before, and where the motive for perpetrating a fraud was entirely gone.

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LORD DENMAN, C. J.—Mr. Attorney-General, we do not think it necessary to hear you.

The Judges held the conviction to be right.

Ireland.

MUNSTER CIRCUIT.

LIMERICK COUNTY SPRING ASSIZES, 1848.

CROWN SIDE.

(Before MOORE, J.)

ANONYMOUS. (a)

Evidence—Statute 27 Geo. 3, c. 15—Assault to deter party from giving evidence—Common assault—1 Vict. c. 85, s. 10.

The prisoners were indicted for an assault under the statute 27 Geo. 3, c. 15, which makes it felony to make use of any force, or inflict any manner of bodily harm or punishment whatsoever, to deter any person from giving evidence; the evidence was, that the prosecutor, while detained in gaol as a witness against certain persons, was frequently spoken to on the subject by the prisoners, called a spy and informer, and told not to prosecute, and two days after was assaulted and beaten by them, no allusion being made to the subject during the assault.

Held, that the charge of felony under the statute was not sustained.

THE prisoners were indicted for assaulting the prosecutor, for the purpose of deterring him from giving evidence on a criminal charge then pending against two persons named Maher and

ANONYMOUS.

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

ANONYMOUS. **McMahon.** The indictment was framed under the statute 27 Geo. 3, c. 15, which makes the offence felony. (a)

Assault—
Evidence.

The case mainly rested upon the testimony of the prosecutor, who stated that while he was detained in gaol as a witness against the above-mentioned persons, the prisoners asked him, was he turned informer, and told him not to do any such thing, as to be prosecuting boys, mentioning the names of Maher and McMahon, and called him a spy, and two days after beat him severely, but did not say anything to him on the subject at the time they were beating him, but did continually before.

This being the only evidence to show that the assault was committed for the purpose of deterring the prosecutor from giving evidence,

MOORE, J.—Thought the prosecution could not be sustained.

John Plunket.—It is a question for the jury; they can, under the 1 Vict. c. 85, s. 10, convict the prisoners of an assault, for the felony charged in the indictment includes an assault against the person.

The case was left to the jury as one of assault.

Verdict, Guilty.

For the crown,

Bennett, Q. C., and The Honourable J. Plunket, Q. C.

The prisoners were undefended.

(a) The 8th section of the stat. 27 Geo. 3, c. 15, enacts that if any person or persons "shall make use of any manner of force, or inflict or threaten to inflict any manner of bodily pain or punishment whatsoever," to deter or prevent any person from giving evidence in any case, civil or criminal, or on account of any person having declined or refused to enter into any unlawful combination or agreement, or on account of any persons having given evidence in any action or prosecution, civil or criminal, every such person and all persons aiding, abetting, and assisting therein, being thereof by due course of law convicted, shall be adjudged guilty of felony, without benefit of clergy, &c., &c.

OMMISSION OF OYER AND TERMINER AND
GENERAL GAOL DELIVERY FOR THE
COUNTY AND CITY OF DUBLIN.

August 9, 1848.

(Before PIGOT, C. B., and PENNEFATHER, B.)

REG. v. FARRELL AND MOORE. (a)

Practice—Prosecution—Calling witnesses on back of bill.

Defendant ought not to have imposed upon him the appearance of acting prosecutor.

He witnesses who have been examined before the grand jury ought to be called by the prosecutor.

Witness ought to be employed to prosecute.

In cases of felony, the prosecutor will be allowed the expenses of the prosecution, where it has been properly conducted.

CATHARINE FARRELL and Jane Moore were given in charge to the jury upon an indictment charging them with having unlawfully received certain articles, the goods of Patrick Why, well knowing them to be stolen. The prosecution was conducted by the clerk of the crown.

A. Curran defended the prisoners.

The prosecutor and his servant-maid were examined in support of the charge, and stated that they believed the articles produced, which were found by a serjeant of the detective police at the house of the prisoner Catharine Farrell, to be the property of the prosecutor, but would not swear positively to their identity.

Curran addressed the jury, who, after a brief charge from Baron Pennefather, at once acquitted both prisoners. Upon which the prosecutor said that he had not hitherto made any objection, being unwilling to prejudice the prisoners, but that he now wished to state that one of the witnesses, who had been examined before the grand jury, had not been produced, although his testimony would have been most important on the trial, and he had been concerned in the robbery, and had since become an outlaw.

PENNEFATHER, B.—If the fact is as you state it, there has been a great negligence somewhere.

The clerk of the crown, in answer to the court, stated that the name of the witness in question appeared on the back of the bill.

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—
Practice—
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(a) Reported by W. ST. LEGER BARINGTON, Esq., Barrister-at-Law.

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PENNEFATHER, B.—Then it was very wrong not to have called him, and examined him at the trial. It is the duty of the clerk of the crown, where counsel are not employed to prosecute, to conduct the prosecution generally, and examine the witnesses; and where the names of witnesses are on the back of the bill, it is his duty, it is incumbent on him to call them; it is not only due to the public, but also due to the prisoner, that every one produced before the grand jury should be called. (a)

Curran.—It would be very desirable if your lordships would make a rule that has been made in England, that where there is no counsel employed by the prosecutor, the prosecution should be given to one of the junior counsel present, for the assistance of the clerk of the crown, who has a great deal of other business to attend to.

PENNEFATHER, B.—I disapprove of employing counsel *on the moment*, as I do not think a prosecution can be properly carried on in that way; I will say that in many instances cases are very imperfectly prosecuted by the clerk of the crown. But in this instance Mr. Brophy, the prosecutor, ought to have attended to the case: he might have employed counsel. If parties do employ counsel to prosecute, it is in the power of the court to order them the expenses of the prosecution; and where it has been properly carried on, I have never omitted to do it: really, the not having counsel employed to prosecute, does impose, or appear to impose, on the judge, a duty which he ought not to have the appearance of discharging.

Curran.—In two cases reported in Cox's Criminal Law Cases, an opinion has been expressed by judges in England, which coincides with your lordship's. (See *Reg. v. ———*, 1 Cox's Crim. Cas. 48; *The Queen v. Hezell*, ib. 348; and also *Reg. v. Page*, 2 Cox's Crim. Cas. 221.)

PENNEFATHER, B.—I have not seen those cases, and was not aware of them, but I am very glad to have been corroborated by them in my opinion. Where a prosecutor is of ability to do it, he ought to employ counsel, and in most cases of felony the court will give him the expenses where the prosecution has been properly conducted.

(a) See *The Queen v. Barley*, 2 Cox's Crim. Cas. 191; *R. v. Carpenter*, 1 Cox's Crim. Cas. 72; and *R. v. Holden*, 8 C. & P. 606, in favour of the necessity of all the witnesses on the back of the bill being called by the prosecutor; but see the later case of *Reg. v. Edwards, Underwood, and Edwards*, p. 82, *supra*, per ERLE, J., *contra*.

QUEEN'S BENCH.

EASTER TERM, 1848.—May 5 and 6.

[IN ERROR.]

THOMAS SHEA v. THE QUEEN.

WILLIAM DWYER v. THE QUEEN. (a)

Indictment, sufficiency of—Stat. 1 Vict. c. 85, s. 2—Wounding by fire-arms with intent to murder—Non-averment of infliction of injury dangerous to life—Capital sentence—Several counts—Judgment on one count not vitiated by discharge of jury from finding on the others.

An indictment, in the first count, charged that T. S., with a leaden ball and shot, out of a gun by force of gunpowder shot and sent forth, S. D. feloniously did strike, penetrate, and wound, with intent, in so doing, the said S. D. feloniously to kill and murder; and that W. D. was present, aiding and abetting. Another count charged W. D. as principal, and T. S. as present, aiding and abetting; and in other counts they were charged as principals and accessaries respectively in the like wounding of S. D. with intent to disable him, and to do him grievous bodily harm. The record stated that the prisoners were found guilty upon the first count, and sentenced to death; and that the jury were discharged from giving any verdict upon the other counts.

Held, that the first count sufficiently charged a wounding within the meaning of the stat. 1 Vict. c. 85, s. 2, and warranted the judgment pronounced upon it, notwithstanding the non-averment of the infliction of bodily injury dangerous to life.

Held also, that the discharge of the jury from giving any verdict upon the issues joined on the other counts did not render the judgment upon the first count erroneous.

THE prisoners Thomas Shea and William Dwyer were tried and convicted at the Spring Assizes of 1848 for the King's County, before the Lord Chief Justice, upon an indictment framed under the provisions of the statute 7 Will. 4 & 1 Vict. c. 85, the first count of which was as follows:—

King's County, to wit:—The jurors for our lady the Queen, upon their oath, do say and present that Thomas Shea, late of Laughton, in the King's County, labourer, William Dwyer, late of same place, labourer, and a certain person to the jurors aforesaid unknown, being evil disposed persons, and not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the 5th day of November, in the 11th year of the reign of our sovereign lady Queen Victoria, with force and arms, at Laughton aforesaid, in the King's County aforesaid, in and upon Stephen Dobbyn, in the peace of God and our lady the Queen, then and there being, feloniously did make an assault; and that the said Thomas Shea, a certain gun then and

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there loaded and charged with gunpowder and one leaden ball and divers leaden shot, which gun he the said Thomas Shea, in both his hands, then and there had and held, at and against and upon the said Stephen Dobbyn then and there feloniously did shoot off and discharge; and that the said Thomas Shea, with the leaden ball and shot aforesaid, out of the gun aforesaid, then and there by force of the gunpowder shot and sent forth as aforesaid, the said Stephen Dobbyn, in and upon the left arm and left thigh of him the said Stephen Dobbyn, then and there feloniously did strike, penetrate and wound, with intent, in so doing, him the said Stephen Dobbyn then and thereby feloniously, wilfully and of his malice prepensed to kill and murder; and that the said William Dwyer and the said person to the jurors unknown at the time of committing the felony aforesaid, then and there with force and arms, at Laughton aforesaid, in the King's County aforesaid, feloniously, wilfully, unlawfully and maliciously were present, feloniously counselling, aiding and abetting the said Thomas Shea the felony aforesaid, in manner and form aforesaid, to do and commit, against the peace of our said lady the Queen, her crown and dignity, and contrary to the form of the statute in such case made and provided.

Indictment.

In the second count the prisoner Shea was charged with shooting at Dobbyn with intent to disable him, and the other prisoner with being present, aiding and abetting; and in the third count the offence was charged to have been committed with intent to do him some grievous bodily harm.

The fourth count charged a wounding (in manner stated in the first count) by the prisoner Dwyer, with intent to murder, and that Shea was present aiding and abetting.

The fifth and sixth counts charged the shooting at by Dwyer, with intent to disable and to do some grievous bodily harm, and that Shea and the said person unknown were present aiding and abetting.

The seventh count charged a wounding by a person unknown, with intent to murder, and that the prisoners Shea and Dwyer were present aiding and abetting.

The eighth count charged a shooting at by a person unknown, with intent to disable, and that Shea and Dwyer were present aiding and abetting.

The ninth count charged a shooting at by a person unknown, with intent to do some grievous bodily harm, and that the prisoners were present aiding and abetting.

The record, after setting out the above indictment, and stating that the prisoners had pleaded not guilty, and that issue had been joined on the part of the crown, and that the sheriff had been directed to cause a jury to come, &c. &c., proceeded in the following terms:—"And the jurors of the said jury so impanelled as aforesaid, being duly elected and sworn to speak the truth of and concerning the premises in the indictment aforesaid above specified, do say upon their oath, that they the said Thomas Shea and William Dwyer respectively are and each of them is guilty of the

felony in the said first count of the said indictment above specified and charged, in manner and form as the same is by the said first count charged and alleged against them the said Thomas Shea and William Dwyer. Whereupon as to the several issues joined in the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th counts of the said indictment, the said jurors of the said jury so impanelled as last aforesaid, are by the court here discharged from giving any verdict upon the premises on the several issues so 2ndly, 3rdly, 4thly, 5thly, 6thly, 7thly, 8thly, and 9thly above, in manner and form as the same are joined, or any of them. Upon which it is severally demanded of them, the said Thomas Shea and William Dwyer, whether they or either of them now have or hath anything to say for themselves or himself, wherefore the said justices here ought not, upon the premises and verdict aforesaid, to proceed to judgment and execution against them the said Thomas Shea and William Dwyer, and each of them, for the said felony in the said first count of the said indictment above specified and alleged, who nothing further say than they had before said. Whereupon all and singular the premises being seen and by the said justices here fully understood, it is considered and adjudged by the said court here, that they the said Thomas Shea and William Dwyer, and each of them, for the said felony in the said first count of the said indictment above specified and charged, be taken from the bar of the court where they now stand to the place from whence they came, the gaol, and that they and each of them be thence conveyed to the common place of execution, the gallows, and that they and each of them be there hanged by the neck until they and each of them be dead."

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Indictment.

Upon this record the prisoners sued out separate writs of error, assigning severally the following errors,—

Firstly. That the judgment of death was not warranted for the offence stated in the first count of the indictment.

Secondly. That judgment of death was not warranted by any matter stated upon the record.

Thirdly. That it did not appear by the record that the prisoner was convicted of a felony warranting the judgment therein.

Fourthly. That there was a misjoinder of the first with other counts.

Fifthly. That it did not appear from the first count that any bodily injury dangerous to life was inflicted on the said Stephen Dobbyn.

Sixthly. That the jury ought not to have been and could not legally be discharged from finding a verdict upon the issues joined on the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th counts of the said indictment.

Seventhly. That it did not appear by the record that there was any strong or urgent necessity or any lawful cause or excuse for discharging the jury from finding a verdict upon those issues.

Eighthly. That it did not appear by the record that the prisoner was called upon to look to his challenges upon the impanelling of the jury.

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And ninthly. That judgment was given for the said lady the Queen; whereas it ought to have been given for the said prisoner. To these assignments the crown pleaded in each case *in nullo est erratum*.

The prisoners having been brought up to the bar of the court, the cases were now (May 5) called on for argument.

Argument for
prisoners.

Hayes (with whom were *McDonogh*, Q. C., and *J. A. Curran*), for the plaintiffs, in error.—There are nine errors assigned upon this record. The first, second, third, and fifth raise but one substantial question, namely, whether upon the first count of the indictment a sentence of death could legally be pronounced. The sixth and seventh raise another question, whether the course adopted in discharging the jury from finding upon the issues after the first was legal or not. These two are, upon consideration, the only grounds of error upon which we mean to rely. The first count of the indictment appears to be framed under the statute 7 Will. 4 & 1 Vict. c. 85. It states that a certain gun he the said Thomas Shea, in both his hands, then and there had and held, at and against and upon the said Stephen Dobbryn then and there feloniously did shoot off and discharge; and that the said Thomas Shea, with the leaden ball and shot aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder, shot and discharged and sent forth as aforesaid, the said S. D. in and upon the left arm and thigh of him the said S. D. then and there feloniously did strike, *penetrate and wound*, with intent, in so doing, the said S. D. then and there, &c. &c., to kill and murder. Where a wound of such description is charged, and where the indictment is silent as to that wound being dangerous to life, the offence charged does not come within the 2nd section of the Act of 1 Vict. c. 85, which enacts "That whosoever shall administer to or cause to be taken by any person any poison or other destructive thing, or shall stab, cut, or wound any person, or shall by any means whatsoever cause to any person any bodily injury dangerous to life, with intent, in any of the cases aforesaid, to commit murder, shall be guilty of felony, and being convicted thereof, shall suffer death." [MOORE, J.—You take the word wound in the second section in conjunction with cutting or stabbing, and then say that the word wound in the indictment must mean an injury *ejusdem generis*.] Yes. The first of the series of acts on this subject was Lord Ellenborough's Act, which provides that "if any person shall wilfully, maliciously, and unlawfully, present, point, or level any kind of loaded firearms at any of His Majesty's subjects, and attempt, by drawing a trigger, or in any other manner, to discharge the same at or against his or their person or persons, or shall wilfully, maliciously, and unlawfully stab or cut any of His Majesty's subjects with intent, &c. to murder or rob, or to maim, disfigure, or disable such His Majesty's subject or subjects, or with intent to do some other grievous bodily harm, &c., &c., the person or persons, &c. so offending, &c. shall suffer death as in cases of felony, without benefit of clergy." In that statute a number of acts, with a number of intents, are enumerated, any one of which

subjected the offender to capital punishment, and so the law continued until the acts of 9 Geo. 4, c. 31, Eng., and 10 Geo. 4, c. 34, Ir., which were enacted in consequence of its being supposed that some persons had escaped punishment from the want of generality in the terms of the previous act of 43 Geo. 3, and in those acts the word wound was introduced. The case of *Rex v. McDermot* (R. & R. 356), shows the necessity of attending strictly to the pure meaning of the word as intended by the Legislature. The word "wound" in the statute of 10 Geo. 4, is used as a generic term, the injury averred in the first count of the indictment does not come within the legal meaning of it. In *R. v. Stephens* (1 M. C. C. 409), it was held that to support an indictment under the corresponding English act, 9 Geo. 4, c. 31, the wound must be inflicted with some instrument, and the conviction was held erroneous; so in *Murrow's case* (1 M. C. C. 456), it was held that throwing vitriol with intent to disfigure, and so wounding a person, was not a wounding within the statute. In *Sheard's case* (2 M. C. C. 13), it was at first doubted whether a wound inflicted on the prosecutor's head by a blow of a gun, came within the statute, because a hat intervened, but in that case the conviction was upheld. The Legislature having, in the reign of Geo. 4, classified the offences, there is a further classification in the act of 1 Vict. c. 85, the second section of which provides, that those who do certain acts therein specified shall suffer death, but that those who do certain other acts specified in the third section, though they may be of as heinous a nature, shall suffer the secondary punishment of transportation only. [BLACKBURN, C. J.—Then your proposition is, that shooting at with intent to murder, is not within the second section.] I do not mean to say but that it may be brought within that section by proper words and proper evidence at the trial. [MOORE, J.—By showing the infliction of an injury dangerous to life.] Just so. [MOORE, J.—If a man sawed a plank across which he knew a man would walk, and the man was killed by it, would not that offence come within the words, "or shall by any means whatsoever, cause to any person any bodily injury dangerous to life"?] The court will construe the statute most strictly in *favorem vite*, and will not by any equity bring a man within the statute, if he does not come within the words of it: *Rex v. Ellis* (5 B. & C. 395.) [PERRIN, J.—You need not argue that question.] The words of the indictment ought to bring the offence within the 2nd section of the statute; the wide general sense in which the word wounding is used by medical men is not the sense in which it ought to be taken in interpreting this statute, thus, throwing vitriol was held not to be wounding, within the statute, although a wound was caused by it; a gunshot wound is not within the second section of the statute of 1 Victoria, unless it is proved to have inflicted a bodily injury dangerous to life, and it is so averred in the indictment. The 3rd section of the statute provides, "that whosoever shall attempt to administer to any person any poison or other destructive thing, or shall shoot at any person, or shall by

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drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent in any of the cases aforesaid, to commit the crime of murder, shall, *although no bodily injury* be effected, be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be transported, &c., &c." That is, whether any bodily injury be effected or not; of this mode of construction there is an instance in the case of the statute 7 Geo. 2, c. 14, giving a power to the court to refer an attorney's bill of costs for taxation, "although no action or suit shall be then depending in court touching the same." These words have always been construed to mean whether any action is depending or not; therefore these two cases are provided for,—where the shooting at does not wound, and where it does wound, without inflicting any bodily injury dangerous to life;—then there only remains a third kind of shooting at, where the bodily injury inflicted is dangerous to life. The 4th section provides for the case of shooting at, where the intent is not to commit the crime of murder, but to disable or do some grievous bodily harm, and this and the preceding section specify in terms injuries and attempts to injure by firearms, which are not so specified in the 2nd section. Secondly,—the discharge of the jury from finding on the counts after the first is erroneous; I have not been able to find any case of a jury being so discharged; even at the civil side of the court it could not be done. The rule is, that a judge cannot discharge the jury from finding on any of the issues joined between the parties, unless he sees that from other findings on other issues, the findings on such issues would be wholly immaterial: (*Powell & others v. Sonnett & others*, 3 Bing. 382, and 3 Bligh, 545; *Cossy v. Diggins*, 2 B. & A. 546.) In this case it cannot possibly be said that any of the findings are immaterial. We are to take this case as if every count in this indictment subjected the prisoners to a secondary punishment. The jury ought not to be discharged without lawful cause, but there is no allegation here upon the record to show any necessity for discharging the jury from these issues, or the occurrence of any fatality. It makes no difference what the findings would have been, or whether the error be advantageous to the prisoners or not: (*Becher's case*, 8 Co. Rep. f. 59, p. 259.) [MOORE, J.—My difficulty is this: suppose a man placed on his trial charged in one count with the murder of A. B., and in another with the murder of C. D., and that he does not object to being tried on both issues, and he is found guilty on both, and there is error in the judgment upon one of the findings, how a good judgment upon the one issue can be vitiated by something erroneous in the judgment on the other.] The court is to review the whole proceeding, and if there is error on the record in any part of it, to give the prisoners the benefit of it.

Griffiths (with whom were the Attorney-General) and *Corballis*, for the crown. The indictment here sufficiently follows the requirements of the statute: (Arch. Cr. L. 447, 6th edit.) It does

not signify by what instrument the wound is inflicted: (*Rex v. Payne and another*, 4 C. & P. 558.) As to the second objection the discharge of the jury was not irregular. It is not necessary that there should be a finding on all the counts of an indictment. The Attorney-General might have entered a *nolle prosequi* upon the last eight counts of this indictment: (*Reg. v. O'Connell*, 7 Ir. L. Rep. 336; *Rex v. Butterworth*, R. & R. C. C. 521.) [PERRIN, J.—Do you mean to say that an Attorney-General could, after a case has gone to the jury, and before a verdict has been given, enter a *nolle prosequi*? If he can do so it is new to me.] In this case the prisoners, if again arraigned on the same charge, might plead *autrefois convict*: (*Conway v. The Queen*, 1 Cox's Crim. Cas. 210, and 7 Ir. L. Rep. 149, S. C.; *Rex v. Hughes*, 1 Cox's Crim. Cas. 247; *Reg. v. Austin*, 7 C. & P. 796; *Reg. v. Douglas*, 2 Cox's Crim. Cas. 253.) There is no crown case in which a discharge of a jury from the findings upon some of the issues, as in this case, has been held erroneous; the only cases in which it has been so held are civil cases, which were so decided on the ground of discontinuance: (*Reg. v. Jones*, 8 C. & P. 777.)

M'Donough, Q. C. contra.—There is no authority; no case to be found in the books of an entry of the discharge of the jury in the way in which it appears on this record; the entry on the record is, that "the jurors of the said jury so impanelled as aforesaid, being duly elected and sworn to speak the truth of and concerning the premises in the indictment above specified, do say upon their oath, that they, &c., the said Thomas Shea and William Dwyer respectively are and each of them is guilty of the felony in the said first count, &c.;" it then goes on to state, that as to the other issues they are by the court discharged from giving any verdict upon them, but every part of the case ought to be brought to a proper legal termination, and there ought to be a verdict on every issue: (*Reg. v. Downing & Powis*, per Alderson, B., Den. C. C. 55; 1 Cox's Crim. Cas. 156, S. C.) in *Rex v. Hayes*, (2 Lord Raym. 1518; 2 Strange, 843, S. C.) the marginal note states that no judgment can be given upon a verdict which leaves undecided any part of the matter put in issue. [BLACKBURN, C. J.—That was the case of a special verdict.] In *O'Connell & others v. The Queen* (11 Cl. & Fin. 296; 1 Cox's Crim. Cas. 498), Baron Parke says "the question being how these counts are to be dealt with on the face of the record, I should have said *à priori*, that it was the duty of the court, acting between the crown and the accused, and the right of the accused to have the charge of each offence, for as such I must treat it, properly and finally disposed of on the record, so that the accused and the crown might know for what offence the punishment was inflicted, and for what not; and so that the accused might plead his conviction in bar of another indictment for the offence for which he was punished." Suppose the prisoner was punished on the first count, has he not a right to a finding on the other counts to enable him if again put on his trial for the same charges, to plead *autrefois acquit*, or *autrefois convict*: the very circumstance of there being no instance of such an entry

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as the present to be found in the books, is a proof of its illegality. There is no case to sustain the proposition that the court shall, of its own mere power, discharge a jury from finding on several of a series of issues. In *O'Connell v. The Queen* (11 Cl. & Fin. 374, 1 Cox's Crim. Cas. 528, S. C.), Lord Denman, speaking of the mode of dealing with an indictment just like the present, says that a verdict ought to be taken on all the good counts, and says, "if any of the counts appeared to be bad I should take the verdict on the good counts only: the prosecutor might enter a *nolle prosequi* on the bad counts or offer no evidence, and consent to a verdict of acquittal upon them, or possibly they might be quashed for insufficiency;" but there is no instance of a prosecutor intercepting a case which has gone to the jury. And no such thing appears to have occurred to Lord Denman as that a judge might discharge the jury of his own mere motion. [MOORE, J.—Does Lord Denman express any opinion as to what would be the result, if the course he suggests was not taken.] No. [CRAMPTON, J.—He says, "I should take the verdict on the good counts only;" that is, I take no verdict on the others, and leave that to the prosecutor to deal with.] The whole record must be dealt with. Before the case has gone to the jury is the time to quash counts or indictments, before the jury are charged with them. There is no analogy to the case of civil actions. The jury are bound to discharge themselves of every part of their obligation. In civil actions, where the finding on any one issue plainly goes to the whole action, I admit that the jury may be discharged as to the others; but courts are not very astute in distinguishing whether an issue goes to the whole action: (*Tinkler v. Rowland*, 4 Ad. & E. 868.) In a criminal case a judge has no right to discharge a jury except for a serious reason; and the circumstances must be expanded on the record, to show the necessity of discharging them from the issues: (*Conway v. The Queen*, 1 Cox's Crim. Cas. 210; 7 Ir. L. Rep. 149, S. C.) No doubt if that which is only a contingency turns out to be a reality,—if a man be executed upon the first count, it is no matter what is done upon the others; but if there was a pardon granted for the offence on the first count, he might be tried again upon the other counts on which no findings were entered. [CRAMPTON, J.—If a party was in such case put on his trial again, he might, according to the case of *Conway v. The Queen*, show that he was put again upon his trial for the same state of facts as he had been tried for before.] There is this difference between a civil and a criminal case; in the former, if a party consents, it gives jurisdiction; in criminal cases the prisoner cannot consent: (*Edge v. Wandersford*, 9 Ir. Law R. 162;) the case of *Reg. v. Jones* (8 C. & P. 877), is not in point here, the verdict was taken on the first count, and as to the others the jury are discharged; there, there was a count for common assault joined with several counts for felonies. [CRAMPTON, J.—That case differs from the present only in this, that there the record was not made up.] The sentence is not warranted by law; on express authority, the word "wound" has a specific meaning attached to it. The object of the Legislature, in introducing the word into

the acts of Geo. 4, was to obviate the difficulty arising upon the stat. 43 Geo. 3. The words stab, or cut, only relate to wounds by instruments capable of stabbing or cutting, stabbing being only applicable to a pointed instrument, cutting to a sharp instrument: (*R. v. Beckett*, 1 M. & Rob. 526; *R. v. Withers*, Mood. C. C. R. 294.) The wound must be with an instrument, therefore biting is not within the act: (*R. v. Harris*, 7 C. & P. 446;) and it has been expressly decided that the meaning of the word "wound," in the act of Victoria, is the same as the meaning of it in the previous acts of Geo. 4: (*R. v. Jennings*, 2 Lewin's C. C. 132.) [CRAMPTON, J.—Would the throwing of a stone by an instrument be a wounding?] The case is not to be decided upon any equitable construction of the statute: (*R. v. Cadman*, Mood. C. C. 114.) The object of introducing the word wound was to obviate the difficulty arising from the want of sufficient generality in the 43 Geo. 3. A wound must be an injury from some instrument, and not inflicted by cutting or stabbing, but by some instrument by which an internal injury is produced. [BLACKBURNE, C. J.—Then you would say, the word wound does not refer to a wound by firearms, so that if a man wound another by the butt of a gun, it would be a wounding within the act of Parliament, though if he fired at him it would not.] A wound with any of the instruments mentioned in 1 Russell on Cr. 731, is enough: (*Rex v. Sheard*, 7 C. & P. 846.) [BLACKBURNE, C. J.—If this case is the same as *Fogarty's case*, (2 Cox's Crim. Cas. 105, and 10 Ir. Law R. 53, S. C.) you need not proceed unless you have anything further than was urged in that case.] Under the 4th section of the stat. of 1 Vict. c. 85, whether a man wounds or not, if he make the attempt with any of the intents therein specified, he is guilty. The Legislature, in the 2nd section, contemplated the case of private assaults, with intent to murder; where the party intends to deprive another of life, either by cutting with a sharp instrument, or stabbing with a pointed instrument, or wounding by a blunt instrument, and not merely contemplates some injury, but actually carries out his intention by inflicting a bodily injury dangerous to life, the offence comes within the 2nd section. [MOORE, J.—Might not the natural meaning be this: if you cut, or stab, or wound by any other means, with intent to commit murder, by something which would not be a stabbing or cutting, as in the case which I have suggested of the sawing of a plank, which a person was to walk over, the offence comes within the section. It is clear that cutting or stabbing is a wounding; are we, then, to restrict the meaning of the word so; is not a gunshot injury a wound also?] In legal parlance, cutting is not a wound. [PERRIN, J.—It seems to me that the real question on this section is, whether the words bodily injury dangerous to life, are to over-ride the whole section, either in meaning or in judicial direction to the jury.] The indictment, in *Reg. v. Cruise* (8 C. & P. 541), is a precedent in our favour. [CRAMPTON, J.—The case of *Fogarty v. The Queen*, is directly in point.]

The Attorney-General (*Monahan*), in reply. *Fogarty v. The Queen*, is expressly in point. The objections here are contrary to the whole

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course of precedent, is it possible to say, looking to the words of the 2nd section, that in an indictment under it, it is necessary to be inserted, that a bodily injury, dangerous to life, has been inflicted? Is it possible, for instance, to contend that, in an indictment for administering poison, it is necessary to add those words? But the word wound has received a legal definition, within which the injury in the present case, comes. There must be a breaking of the skin to constitute a wound; and it has been so decided, over and over again, upon the 9 Geo. 4, c. 31: (Russ. on Cr. 729, 730, and the cases there cited.) The words, bodily injury dangerous to life, apply to the words immediately preceding "by any other means;" for there are other injuries dangerous to life, without cutting, stabbing, or wounding; there is, for instance, bruising, without breaking the skin. [MOORE, J.—The words are, "cause any injury."] Suppose a plank was sawed, and a person fell into the water in consequence, and there was no breaking of the skin, still the person might sustain, by falling into the water, such injury as would be dangerous to life; or suppose, the breaking of a collar bone: (*R. v. Wood*, Mood. C. C. R. 278.) Those words are introduced to meet the case of such injuries. [MOORE, J.—Suppose a person was to attempt to strangle another, and brought him to the verge of death, though the skin was not abraded, it would be very hard to hold that it would not be to cause an injury dangerous to life, within the meaning of the 2nd section of the act.] There may be a gunshot injury without a wound, as by a spent ball. The words bodily injury dangerous to life, no more override the word wounding, than they do the words cutting or stabbing. The precedents do not go on to say, after cutting or stabbing, that those means produce an injury dangerous to life: (Archb. Cr. L. 447, 448; edit. 1846; Russ. on C. R. 739.) If throwing a stone out of the hand, or a piece of lead, would be a wounding, within the statute, it would seem strange that throwing it by the superior force of gunpowder should make it the less a wounding. As to the remaining objection, that there is error on the record, because on some of the counts there are no findings, the case of *Rex v. Hayes* (2 Lord Raym. 1518, and 2 Str. 843, S. C.) is not in point. [BLACKBURN, C. J.—In fact, in that case there was no verdict: there was a special verdict, and it was left to the court to settle.] In *Reg. v. O'Connell*, the whole case shows, that a single finding on a single good count is quite enough: suppose, now, there was a good count, and a good finding on it, and bad findings on the others, would not the duty of the court of error be to confirm the judgment on the good count, and award a *venire de novo* on the others? *O'Connell & others v. The Queen* (11 Cl. & Fin. 245, 258, 295; 1 Cox's Crim. Cas. 413, S. C.) There are several civil cases which show that, where the decision of the jury is not necessary to enable the court to give judgment, they may discharge the jury as to those issues, without the consent of the parties: (*Powell v. Sonnett*, 3 Bingh. 381, and 1 Bligh, N. S. 545; *Rex v. Johnston*, 5 Adol. & E. 513.) As the extreme punishment of the law is imposed for the offence in the first count, it becomes unnecessary, if there is a verdict of guilty

on the first count, to do anything with the others, as if the penalty is carried out, no further execution can be done; could the court pronounce sentence of death upon one count, and then, in the same breath, sentence the prisoner to be transported for an offence on another, and pass a sentence of imprisonment on a third? No case has been referred to in which it has been done. [BLACKBURN, C. J.—In *Conway's case* (1 Cox's C. Cas. 210, and 7 Ir. Law R. 53, S. C.), whether it was decided rightly or wrongly, there was no sufficient reason whatever appearing on the record for the discharge of the jury; but here there is a very sufficient reason that sentence of death has been passed on the first count. What occurs to me is this, that it is utterly impossible, after a sentence of death on the first count, to pronounce any other sentence; it would be so inconsistent that no execution could be done on either.]

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BLACKBURN, C. J.—These are writs of error to reverse the judgment pronounced against the prisoners, who were indicted and found guilty of a capital offence before me at the last assizes of Tullamore. The conviction and judgment were on the first count of the indictment, which charged the prisoner Shea with feloniously discharging a gun at, and wounding Stephen Dobbyn with intent to murder him, the prisoner Dwyer being present, aiding and abetting. This count was founded on the second section of the 7 Will. 4 & 1 Vict. c. 85; there were eight other counts, by some of which the prisoners are charged capitally, and in others of them with transportable felonies; but all under the provisions of the same statute. The jury found the prisoners guilty on the first count, whereupon they were discharged from giving any verdict on the issues joined on all the other counts, and the court pronounced judgment on the first count, which judgment we are now called on to reverse. The objections which have been relied on are, first, that judgment of death is not warranted by the matters stated in the first count of the indictment, and secondly, that the judgment is erroneous by reason of the discharge of the jury from the issues on the other counts. The first objection is rested on the argument that the wounding with firearms, with the intent to murder, is not within the meaning of the 2nd section of the act, and that it should have been averred, which it is not, in the first count, that the wound was dangerous to life; we think that this averment was not necessary, and that it is as obvious from the plain intent as it is from the grammatical construction of the section, that to stab, cut, or wound, with intent to murder, though the stabbing, wounding, or cutting were not dangerous to life, is a capital offence under this section; the words which follow, "by any means cause to any person any bodily injury dangerous to life," plainly are meant to designate cases in which, though there may not be stabbing, cutting, or wounding of the person, such bodily injury is inflicted as to be dangerous to life. This is the construction which this court gave to the statute in the case of *Fogarty v. The Queen* (Cox's Crim. Cas. 105, and 10 Ir. Law R. 53, S. C.). The

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indictment there contained two counts, the first was the same as the first count of the present indictment, it stated a wounding by firearms with intent to murder; the second count stated an assault by certain means to cause a bodily injury dangerous to life, to wit, by discharging firearms at, and wounding with a bullet with intent to murder. On each of these counts there was a verdict, and on each, judgment and sentence of death; the error assigned and argued, as here, was that the first count warranted only sentence of transportation, because it omitted to state that the injury was dangerous to life, and that, therefore, this count only stated matter which warranted a conviction under the 3rd section of the act. To this the *Attorney-General* replied that the first count was in the very words of the statute, and the court acceded to this view of the case, holding, as I have before said, that where a wound is inflicted by any instrument with intent to murder, the crime is complete, even though the injury be not dangerous to life; that case, therefore, rules the first cause of error. I shall only add that the argument of the prisoner's counsel, that wounding by fire-arms is not such a wounding as is meant by the part of the 2nd section I have been considering, and that the wound must be made by an instrument *ejusdem generis* as those by which stabbing or cutting may be inflicted, is completely answered by the authority of the case of *The King v. Briggs* in 1 Moo. C. C. 318. In that case the indictment stated the wounding to have been by striking with a stick, and kicking with intent to maim; the words of the section on which it was founded were "stab, cut, or wound," and all the judges were of opinion that the means by which the wound was inflicted need not have been stated, and though stated did not confine the crown to prove those very means, and might have been rejected as surplusage, so that it is manifest that if the wound be inflicted with any kind of instrument with the intent to murder, the crime is committed. The second objection is one for which, as a cause of error, there is no authority, and for which it is not easy to find a reason. The first count is sufficient in law; there is a good finding upon it, and a sentence warranted by law. But notwithstanding, it is contended that the judgment should be reversed, because there were eight issues on other counts from which the jury was discharged; I cannot feel the force of the arguments that assert that this vitiates the judgment: they do not impugn the legality of the process, the validity of the finding of the jury, the sufficiency of the indictment, or the propriety of the sentence; these are the respects in which, generally at least, error is assignable; the objection is mainly rested on this, that no precedent has been found of a judgment made up as this is, showing that the jury has been discharged from finding on some of the issues, and that this discharge may, in cases that have been supposed, work an injury to the prisoners. To decide whether these objections be of any intrinsic value, and whether they constitute error in a judgment with which, in point of fact or merits the untried issues have no connexion, we are to attend to and consider the circumstances under which they have been left untried.

The first count having charged a capital offence, when the jury returned their verdict upon it, it was obvious that the other issues became immaterial, it signified not whether they were found for or against the crown; by the punishment which the court was bound to award on the first count its whole power in this respect must be exhausted; if the other issues were found for the crown what could the court have done? Could it have sentenced the convict already under sentence of death to be transported? Is there any instance of this? Can there be any argument in favour of a practice that Baron Parke truly says savours of absurdity? (*O'Connell and others v. The Queen*, 1 Cox's Crim. Cas. 413, and 11 Cl. & Fin. 245). But to pass by such obvious objections to such a course, may it not be doubted whether any execution at all could be done upon a record in which both sentences of death and transportation were, at the same time, awarded? But suppose the issues to be found for the prisoner: could the judgment award that he should go thereof without a day? Or if it did, of what value or avail could the court assume that to be, when the sentence it was bound to pronounce was the absolute forfeiture of life? The supposed cases of the pardon of the convict, or of the arrest or reversal of the judgment and the possible prosecution of the matters of the untried issues, have not, in the opinion of the judges in England, had the effect which it is here sought to give them. In the case of *The Queen v. Jones* (2 Moo. C. C. 94), there were several counts for feloniously stabbing with intent to murder, to maim, to disfigure, and do some bodily harm; there was also a count for a common assault. The counsel for the prosecution requested that the verdict might be taken on the last count for felony, and this was done, and the conviction held to be right by all the judges. Now here there were several issues untried; the prisoner was convicted of a transportable felony, and there was no finding on the count for the capital offence. There was the same possibility as there is in this case of the pardoning the convict, and of his prosecution for the matters of the untried issues, yet the omission of the findings did not vitiate the conviction. It is further obvious from the same case that if the record was ever made up, it must, according to the fact, have stated that the jury were discharged from finding on those issues, or what was equivalent, have omitted any findings upon them. The practice in England I collect to be to confine verdicts to particular counts; this was done in *The Queen v. Serva* (1 Cox's Crim. Cas. 292). In addition to these reasons for supporting the judgment, it is decided by *O'Connell v. The Queen*, or at least recognized as law, that if the judgment had been confined to the good counts, the bad findings on some of the good counts would not have been a cause of error, though, in fact, those bad findings had left several of the issues untried.

CRAMPTON, J.—I can add little to what has been stated by my Lord Chief Justice; but the deep importance of our decision to the prisoners, and the earnestness with which the case has been urged on the court by their counsel, induce me, even at the risk of

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repetition, shortly to state my reasons for concurring in the rule which has been just announced. If there be any difficulty in the case (and indeed I see none), it arises from the form in which the record has been made up; for it is plain that what was actually done at the trial was rightly done. But on the record as it stands, I think it extremely clear that there is no error. Two grounds of error have been argued: the first is, that the first count of the indictment does not contain any offence which warrants the sentence pronounced upon it, namely, the sentence of death; secondly, that there has been a discharge of the jury from finding some of the issues knit upon the record, and that therefore all the proceedings are void. With respect to the first objection, I think that the argument on the part of the prisoners is grounded altogether on a misconstruction of the statute of the 1st Vict. c. 85. That misconstruction seems to have arisen from confounding *actual injuries* done with an intent to commit murder, which are the subject of the 2nd section of the statute, with the *attempts* to injure, which form the subject-matter of the 3rd section. The 2nd section does not confine the injuries which it contemplates to injuries dangerous to life, except in the last class which it enumerates, viz., the causing of bodily injury. The 2nd section provides, first, against the actual administration of poison; secondly, against stabbing; thirdly, against cutting; fourthly, against wounding; and fifthly, against causing by any means a bodily injury, which bodily injury is dangerous to life. The stabbing, cutting, and wounding, are distinct, though similar, kinds of injury: they are acts done by an instrument which raises the skin and draws blood from the injured party. The bodily injury contemplated may be caused in any manner, but it must be such an injury as is dangerous to life; all these acts done with an intent to commit murder are made capital offences. But no mere attempt to commit any of these offences comes within the 2nd section of the act. But, by the 3rd section, the mere attempt with an intent to commit murder, to do bodily injury in any of the modes specified in that 3rd section, are made felonies, but punishable by transportation or imprisonment, even though no bodily injury should be effected. This is, I apprehend, the true construction of the statute, and that was the construction put upon it in the case of *Fogarty v. The Queen*. The counsel for the plaintiffs, in error, rest their argument upon two grounds, first, that the classes of offences enumerated in the 2nd section previous to the last class, viz., poisoning, stabbing, cutting, and wounding, are qualified by the words "bodily injury dangerous to life," a construction which would equally violate the grammar and meaning of the sentence: another ground of maintaining this objection was that, without calling in aid the qualifying words, the word "wound" had, in this statute, a technical meaning, namely, that it should be a wound of the same description as wounds by stabbing and cutting with which it is associated, and that the wound must, therefore, be inflicted by an instrument of a kind fitted for stabbing or cutting. Now, I admit the rule that associated words are in general to be similarly

construed—but it is equally clear that each word so associated should have its own appropriate meaning, and though stabbing and cutting are both wounding, the word “wound” including both, is more comprehensive than either; and it has been interpreted to mean, as used in this statute, every kind of wound, instrumentally inflicted, by which the skin is raised and the blood is drawn, whether that instrument be blunt or sharp, whether it be held in the hand, or be flung from the hand, or from an instrument wielded by the hand. The argument of the prisoners’ counsel would go to this,—that a gun-shot wound is not a wound within the meaning of the Legislature, because it is not produced by an instrument of the stabbing or cutting kind, although firearms are known to be instruments of the most dangerous kind, and most commonly used when wounds are inflicted with a murderous intent,—and yet the prisoners’ counsel are obliged, by the authorities (1 Russ. on Crimes, 731), to admit that wounds inflicted by throwing a hammer, or a piece of lead, or even a stone, when done with an intent to murder, and whereby the skin is broken, are wounds within the meaning of the act. But the case of *Fogarty v. The Queen* is, on this point, an express authority in favour of the crown. The second objection which is relied on as a ground of error is, the discharge of the jury from any finding on some of the counts of the indictment. If that be error, we have been proceeding erroneously for a number of years in taking verdicts on particular counts, and not entering any upon others. If a jury bring in a verdict upon all the counts, the course frequently pursued is to enter it upon one count only. A question may arise as to the most proper form of making up the record in such cases,—whether a *nolle prosequi* ought to be entered, or an entry of an acquittal, upon the counts upon which there has been no finding; however that may be, we have here the case of a good count, a good finding, and a good judgment upon the record, all applicable to the first count of the indictment. The judgment is entered on the first count: that judgment is perfectly right and regular; but we have been pressed with an argument derived from the case of *Conway & Lynch v. The Queen*, in which it was decided, under the particular circumstances, that a discharge of the jury by the judge amounted to a discharge of the prisoners from a future proceeding. I do not now presume to criticise that decision, but supposing it to have been a sound decision, it cannot govern the present case, for in *Conway & Lynch v. The Queen* the discharge of the jury went to every issue and count in the indictment. But here there is a discharge only from the issues knit on the last eight counts, the trial of which became perfectly immaterial, there being a good finding and good judgment upon the first count. In *O’Connell v. The Queen*, it appears to have been admitted on all hands that a bad finding was tantamount to no finding at all; and that if there was one good count and a good finding, and a good judgment on that count, that the validity of that judgment could not be affected by bad findings on the other counts, or by the bad counts being included in the indictment. There was a difference of opinion in that case amongst

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1 Vict. c. 86.

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the law peers upon other matters, but looking to the speeches delivered by them on that occasion, in the House of Lords, and looking to the advice given by the judges (who had been consulted) on this point, we find unanimity of opinion, namely, that if there had been in that case an erroneous finding, and an erroneous judgment upon every count but one, and if upon that one there was a good finding, and a good judgment, the proceeding would have been deemed valid; this doctrine appears to me applicable to the present case. It establishes that a good count cannot be affected by the others, whether they be good or bad; and we must not forget that when several counts are included in one indictment, they are in contemplation of law counts charging so many distinct offences, upon which different sentences may be entered, as much as if the party had been tried upon several indictments given in charge to the jury at the same time. I have, therefore, no difficulty on this subject. An argument was pressed on the court that a prejudice might be done to the prisoner by no entry being made of a finding one way or other upon these eight counts. That argument is without foundation. If there was an erroneous proceeding in the discharge of the jury (which I by no means say that there was), it would, if the party were put on his trial again for the same offence, be open to him, just as much in this case as it was in *Conway v. The Queen*, to object to a new prosecution. But if we are to consider the offences in the different counts, as substantially the same transaction, the result would be that if a verdict were actually found, as may have been the case in this instance, the prisoner would be at liberty, if a new charge were brought against him similar to the charge on those eight counts, to plead *autrefois acquit* or *convict* as the case might be. Upon all these grounds I feel satisfied that there is no error on this record, and that nothing was done to prejudice the prisoners, and therefore that the judgment ought to be affirmed.

Judgment of
Perrin, J.

PERRIN, J.—The argument on behalf of the prisoners amounts to this, that the words of the section of the statute “whosoever shall administer to, &c., or shall stab, or cut, or wound any person, or shall by any means whatsoever, cause to any person any bodily injury, dangerous to life, with intent to commit murder, shall be guilty of felony,” mean, “or shall wound with any other means than a fire-arm;” that is the argument, but it has been established by a number of cases, that an indictment charging a wound with intent to murder, is quite sufficient, without stating that it was by any instrument. The cases show that it is necessary, by evidence, to prove that it was by an instrument; but those very cases show that the indictment is sufficient, without stating that any instrument was used. The indictment charged that the prisoner the said Stephen Dobbyn, in and upon the left arm and left thigh of him the said Stephen Dobbyn, then and there feloniously did strike, penetrate, and wound, with intent in so doing him the said Stephen Dobbyn, then and thereby feloniously, &c., to kill and murder,” so that it does charge a felonious wounding; but the argument is, that a wounding with a firearm is not within the meaning of the act.

The argument admits that a wound with a knife, or a stick, or a stone, with that intent, is within the act, but that a wound by a firearm, a pistol, or a gun, inflicted with the same intent and under similar circumstances, is not within the act. The words of the act are, "whosoever shall administer to or cause to be taken by any person, any poison or other destructive thing, or shall stab, cut, or wound any person, or shall by any means whatsoever cause to any person any bodily injury, dangerous to life, with intent, in any of the cases aforesaid, to commit murder, shall be guilty of felony." As I have already said, the cases (*Rex v. Briggs* 1 Mood. C. C. 322; *Rex v. Murrow* (*ib.* 456); *R. v. Stevens* (*ib.* 410); *Rex v. Sheard*, 2 Mood. 13,) all show that a charge of *wounding* is good within the act of Parliament; that the wounding is not necessary to be *ejusdem generis* with the wounds mentioned by the act of Parliament, or by an incised wound. It is conceded that wounds include not merely incised wounds, but also those by a stone, &c., and therefore we are called on to abridge the meaning of the word "wound," merely to exclude gunshot wounds—any other wound, it is admitted, would come within the meaning of the act of Parliament—that is exactly what we are called on to do. This position has been stated to be sustained by the 3rd section of the act; it does appear to me that that section sustains it by no means; I think it shows that the object of the Legislature was to punish with a lesser punishment an attempt to commit murder where no injury has been inflicted. As to the case of *Reg. v. Fogarty* (2 Cox's Crim. Cas. 105; 10 Ir. Law R. 53, S. C.), I had not been present at the argument of that case, and was not aware of it. The prisoner was convicted of an offence similar to the present, and on a similar form of indictment; that case I think an answer to the argument, that a crime may not be an offence within one clause of the section, merely because it falls within the terms of another. In *M'Dermott's case* (R. & R. 356), the indictment charged that the prisoner, with a bayonet, "did *strike and cut* the said John Smith with intent to kill and murder," and the evidence was, that the wound was inflicted by stabbing, and that a punctured wound was inflicted, and not by cutting. As to the second objection in this case, that there were distinct counts on some of which there were no findings, still, how could the judge below give way to the notion that these charged separate and distinct offences? Therefore, taking it in a plain common-sense view, when the jury had found the prisoners guilty on one of the counts, it became immaterial to consider the others, therefore by operation of law they were discharged from the necessity of giving any verdict upon them.

MOORE, J.—I fully concur in the opinion which has been pronounced by my learned brothers, and think that there can be no doubt upon the subject; I think that there were two objects in the contemplation of the Legislature: first, cases where there is a *direct* act done to the individual by a party intending to commit murder; secondly, where an injury is inflicted by any other means. I do

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not know anything in the act by reason of which you should limit the meaning of the word "wound"; I think that there is nothing whatever which could come under the meaning of the word "wound," which is not within the meaning of the statute. To cut, or stab, or wound, is a direct act done to the party by the prisoner, but there may be other ways of inflicting injury equally criminal, and I can easily understand that a man might go out intending to commit murder by an act not done directly to the individual, but having a direct tendency to take away life, and that I think is the case contemplated by the act in the last clause of the second section. As to the second objection, it appears to me, as the Lord Chief Justice has said, difficult to see why a judgment on a proper count, and a proper finding, is to be vitiated, because there has been no finding on other counts in the indictment.

Judgment affirmed.

The prisoners, who had been brought up to the bar of the court, were ordered to be remanded.

COMMISSION OF OYER AND TERMINER AND GENERAL GAOL DELIVERY FOR THE COUNTY AND CITY OF DUBLIN.

August 9, 1848.

(Before PIGOT, C. B., and PENNEFATHER, B.)

REG. v. PRENDER. (a)

Statute 11 & 12 Vict. c. 11—Arms Act.

By the statute 11 & 12 Vict. c. 11, it is enacted, that every person who shall, after the day named in a notice specified by the act, have in his, her, or their custody, power, or possession, any gun, pistol, or other firearm, or part or parts of any gun, pistol, or firearm, or any sword, cutlass, PIKE, or bayonet, or any bullets, gunpowder, or ammunition, contrary to the provisions of the act, shall be guilty of a misdemeanor. Held, that a pike-head about ten inches long, capable of being grasped in the hand, and used offensively, but which had no pikestaff or handle attached to it, though it was fitted to receive one, was a pike within the meaning of the statute, notwithstanding the separate enumeration in the previous statute, 47 Geo. 3, sess. 2, c. 54, ss. 10 & 11, of pikes, and pike-heads.

THE prisoner, who was indicted under the provisions of the statute 11 & 12 Vict. c. 11, for having had a pike in his possession on the 28th July last, within a proclaimed district, without being duly authorized, pleaded guilty, stating that he was a smith by

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

rade, and had, long before the act came into operation (two years ago), made the weapon as a toy for his son, a little boy about ten or twelve years old. The article found being produced, it appeared that it was merely a pike-head, no handle or pikestaff being attached to it, and was smaller than such weapons usually are, the blade being about four or five inches, and the part fitted to receive a handle about six inches, in length. Under these circumstances,

J. A. Curran, for the prisoner, proposed to give evidence of the good character of the prisoner, but the counsel for the Crown seeking to draw a distinction unfavourable to the prisoner between the present case and those of certain persons who had, at this same sessions, pleaded guilty to indictments under the same statute, for having had guns in their possession without being duly authorized, *Curran* then submitted that the possession of the article produced was not an offence within the statute. It is not a pike, it is only a pike-head, a part of a pike; the words of the statute are, that "every person who, after the day named in such last-mentioned notice, shall have in his, or their custody, power, or possession, any gun, pistol, or other firearm, or part or parts of any gun, pistol, or firearm, or any sword, cutlass, *pike*, or bayonet, or any bullets, gunpowder, or ammunition, contrary to the provisions of this act, shall be guilty of a misdemeanor."

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c. 11.

PENNEFATHER, B.—The act does not extend to any portion of a pike, and we must hold this to be a pike to sustain the indictment.

Curran.—The 47 Geo. 3, sess. 2, c. 54, ss. 10 & 11, enumerates pikes and pike-heads, showing thereby that there is a legislative distinction between the two things, a pike and a pike-head; the 10th section gave an authority to justices of the peace to withdraw his licence from any blacksmith who was proved to have made, or knowingly suffered to be made in his forge, "any pike or pike-head;" and the 11th section enacted that any smith or other person "who shall make, or assist in making, any pike or pike-head, without a licence from the Master-General, Lieutenant-General, or Surveyor-General of the Ordnance, he shall, being thereof lawfully convicted, be adjudged a felon."

PENNEFATHER, B.—When the Legislature came, with that statute before them, to make the present act, they must have understood an article of this kind to be a pike.

PIGOTT, C. B.—It may be more dangerous than if it had a handle; there might be an article which was a pike-head which could not be used offensively, but this article might be used offensively without any timber being attached to it.

Curran then sought that the prisoner might be at liberty to withdraw his plea of guilty, which the court refused to allow.

The prisoner was sentenced to one month's imprisonment, but as, on a subsequent day, before the session had terminated, he was discharged by the court upon a medical certificate, that he was labouring under a disease of the heart, which rendered confinement injurious to him.

CROWN CASE RESERVED.

April 29, 1848.

(Before all the Judges except ALDERSON, B., COLERIDGE, J., and
MAULE, J.) (a)

REG. v. HENRY F. TUFTS, JEMIMA TUFTS, and WILLIAM TYLNEY.

Forgery—Evidence of intention to defraud.

An indictment for forging a will, charged an intent to defraud a person or persons unknown.

It was proved that the prisoner was the son of the deceased, whose will was forged; and although one of the witnesses stated that he had heard a rumour that the deceased had had another son by a former marriage, of whose existence, however, he knew nothing, except by report, there was no other evidence of any former marriage, or any children of such marriage.

Held, that there was not sufficient evidence of an intention to defraud any one, to support a conviction.

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THE prisoners were indicted for forgery, at the Spring Assizes for the County of Norfolk, before Coltman, J., and Henry Ford Tufts was found guilty on the sixth count, but the other prisoners were acquitted.

The learned judge entertaining some doubt as to the propriety of the conviction of H. F. Tufts, reserved the following case:—

“The prisoners were tried before me at the last assizes for the county of Norfolk, for forgery.

“It is unnecessary to advert to the first and second counts, as the proof was clearly insufficient to support those counts.

“The third count charged the prisoners with forging the will of William Tufts, deceased, with intent to defraud the heir-at-law of the said William Tufts.

“The fourth count charged them with uttering the will, knowing it to be forged, with the like intent.

“The fifth count charged them with forging the will with intent to defraud a certain person or persons whose names are unknown to the jurors.

“The sixth count charged them with uttering the will, knowing it to be forged, with the like intent, as charged in the fifth count.

“Two questions of law arose in the course of the trial.

“The first was, whether the will could be produced and used in evidence.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

The will was in the possession of Mr. Garwood, an attorney. Mr. Garwood stated that Jemima Tufts came to him in the latter part of July or the beginning of August; that she had, on a previous occasion, consulted him about some professional matters, which he had advised her though he had not ever made any charge for that advice.

He said that when she came in the latter end of July or the beginning of August, she brought a paper with her (which was in the forged will), that he judged from what she said that she came to consult him as to that document; that it was for the purpose of enforcing the document.

She said further, 'she did not come to consult me as to what rights were, but that I might enforce her rights under it.'

It was objected on behalf of the prisoners, that Mr. Garwood should not be allowed to produce the document in question, for the case of *Rex v. Smith* (Phillips on Evid. 9th edit. p. 171), cited.

On the other side, *Reg. v. Avery* (8 Car. & P. 596); *Reg. v. Smith* (1 Den. 166); *Reg. v. Farley* (1 Den. 197); *Wilson v. Wilson* (4 T. R. 753), were relied on. I considered the effect of Garwood's evidence to be, that the document was committed to him not to be kept as a confidential deposit, but in order that it might be exhibited in court for the purpose of enforcing her rights, and thought it under the circumstances advisable to receive the document in evidence, with the view of obtaining the opinion of the judges on the point.

The second question in the case arose as follows:—

The prisoner Henry Ford Tufts was the son of William Tufts, whose will was forged.

Mr. Garwood stated that he had heard that William Tufts had a son by a former marriage, but had never seen any child or children of the first marriage, and knew nothing of their existence except by report. No other evidence was adduced, to prove that there had been any former marriage, or any children of the marriage.

I thought that under the circumstances the allegation of an attempt to defraud the heir-at-law of William Tufts was not supported, there being no proof of there ever having been any heir-at-law except the prisoner Henry Ford Tufts; but as the forgery was clearly proved, and it appeared highly improbable that such a crime should be committed except for the purpose of defrauding the heir-at-law, I left the question to the jury upon the fifth and sixth counts, and they found Henry Ford Tufts guilty on the sixth count, and acquitted the other prisoners. But as I entertained a doubt whether a prisoner could properly be convicted on such a count without proof that the forged document was capable of being used as a fraud on some person or other, I reserved the point, and requested the opinion of the judges upon it, as well as on the other point.

Endergast, for the prisoner.—1. The evidence negatived any

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intention to defraud, for the prisoner was heir-at-law of the deceased. [COLTMAN, J.—It did not appear whether the property was realty or personalty; whether it was leasehold or freehold. He might be anxious to get possession of some cottage rents.] The presumption is, that the estate was in fee simple, until a less interest is shown. If the property was personal, still the prisoner who was convicted, and one of those who were acquitted, were the only persons who would be entitled. [ROLFE, B.—The jury find an intention to defraud some person unknown; that rather implies that they supposed there had been a former will. COLTMAN, J.—There was no evidence of that.] There was no suggestion of any former will; but the learned judge directed the jury to infer fraud from the improbability that such an act should have been committed without any intention to defraud. That intention is generally inferred from the consequence of the act; thus, passing a forged acceptance implies an intention to defraud the acceptor in consequence of the legal operation of the instrument; yet, generally, the real intention is not to defraud him, but some other person. Here, however, there is no person who could be defrauded; and therefore there is no ground for the presumption. [PARKE, B.—If there were any persons who had purchased any of the property from the heir-at-law they might be defrauded.] Nothing of the sort was proved. 2. The will was not admissible; it was a privileged communication. [POLLOCK, C. B.—This point has been quite recently decided in *Reg. v. Farley* (1 Den. C. C. 197; 2 Cox's Crim. Cas. 82.)] That case is distinguishable. The witness in that case was not the prisoner's attorney. So in *Reg. v. Jones* (1 Den. C. C. 166; S. C., nom. *Reg. v. Hayward*, 2 Cox's Crim. Cas. 23), the prisoner sent the forged instrument, amongst other papers, to his attorney, ostensibly for professional purposes, but in truth, as the learned judge thought, that the attorney might find it and act upon it; and the case was decided upon the ground that the will was not put into the attorney's hands in professional confidence. *Wilson v. Rastall* (4 T. R. 753), has no application to this case. *R. v. Smith* (1 Phil. Evid. 171), is an authority in favour of the prisoner, and is distinguished by Mr. Phillips from *R. v. Avery* (8 Car. & P. 596), where Patteson, J. held *R. v. Smith* not to be law. [PATTESON, J.—No sentence was passed in *R. v. Avery*, because the prisoner pleaded guilty to another indictment; but in that case I am reported to have said something too strong about *R. v. Smith*, which is certainly distinguishable from *R. v. Avery*.] So is this case.

PARKE, B.—Suppose it were given for the purpose of being shown to a tenant in possession, would it be privileged? And on the other hand, if title deeds are given to an attorney to be used for the benefit of the party giving them, can he be required to produce them against him?

WILDE, C. J.—If title deeds are entrusted to an attorney as an attorney, can it be doubted that he is not at liberty to produce them?

LORD DENMAN, C. J.—But if a forged and false instrument is given to an attorney, ought he not to take it to a magistrate?

WILDE, C. J.—I apprehend that the magistrate could not receive the statement.

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Cur. adv. vult. Forgery.

Afterwards, the judges who heard the argument held that the conviction was wrong, on the ground that there was no evidence of any intention to defraud any person.

Evidence.

Conviction held bad.

EXCHEQUER CHAMBER.

June 24.

(Error from the Queen's Bench.)

DOUGLAS v. THE QUEEN. (a)

Information under 33 Geo. 3, c. 52, s. 62—Form of judgment—Forfeiture—Imprisonment until payment.

An information against an officer of the East India Company for receiving gifts, under 33 Geo. 3, c. 52, s. 62, which follows the words of the statute, is sufficient after verdict, and it is unnecessary to allege the receipt of the money to have been extorsive or colore officii, or whose money was received, or (PLATT, B., dubitante,) to negative that it was received for the use of the Queen.

The judgment for the offence was, that the defendant should pay a fine, and should forfeit a sum of money being the full value of the gift, and that defendant should be imprisoned until he should have paid the fine and forfeiture. The gift consisted of rupees, and their value at the time of the receipt of them was found by the jury.

Held, first, that as the gift was money, there was no option to exercise, whether the gift or the value of it should be forfeited, and that therefore the judgment was right; secondly, that the value of the rupees was properly estimated at the time when the defendant received them; and, thirdly, that the forfeiture being part of the punishment, the court had power to order imprisonment until it was paid.

INFORMATION upon the 33 Geo. 3, c. 52, s. 62. The second count of the indictment stated that Archibald Douglas, Esq., late of, &c., being a British subject, on the 18th of Nov. 1839, and for a long space of time then next following, to wit, until the 1st day of May, A.D. 1841, held and exercised [a certain office in the East Indies, under the East India Company, to wit, the office of

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33 Geo. 3, c. 52.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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resident at Tanjore,] (a) and during all that time resided in the East Indies aforesaid, to wit, at Tanjore aforesaid; and that the said Archibald Douglas, so being a British subject as aforesaid, whilst he held and exercised the said office of resident at Tanjore, in the East Indies aforesaid, as aforesaid, and whilst he resided in the East Indies as aforesaid, and within six years before the filing of this information, that is to say, on the 1st day of January, A.D. 1840, in the East Indies aforesaid, to wit, at Tanjore aforesaid, unlawfully did receive of and from a certain person, called Sevajee Rajah, in the East Indies aforesaid, a certain sum of money, that is to say, the sum of 8,000 rupees, being of the value of 800*l.*, of lawful money, &c., and against the statute in that case made and provided, whereby and by force of the said statute, the said Archibald Douglas was guilty of extortion and a misdemeanor, and by force of the said statute forfeited the said sum of 800*l.*, of, &c., being the value of the said 8,000 rupees so received by the said Archibald Douglas aforesaid. There were many other counts in the information; but it is unnecessary to set them out. In last Michaelmas Term (Nov. 22nd), a *nolle prosequi* having been entered upon some of the counts, judgment was given against the defendant in the Court of Queen's Bench in the following form:—

"That for the extortions and misdemeanors in the said second, third, fifth, eleventh, fourteenth, seventeenth, eighteenth, nineteenth, and thirty-seventh counts respectively mentioned, the said Archibald Douglas do pay certain fines (specifying them) to our said Lady the Queen, and be imprisoned in the Queen's Prison for the space of twelve calendar months; and also, that the said Archibald Douglas, in pursuance of the statute in that case made and provided, do forfeit to our said Lady the Queen the several sums (specifying them), being the full value of the gifts or presents in the said second, third, fifth, eleventh, fourteenth, seventeenth, eighteenth, nineteenth, and thirty-seventh counts respectively mentioned; and that the said Archibald Douglas be imprisoned in the said prison, and there be kept until he shall have paid to our said Lady the Queen the said several fines and every of them respectively, and also the said several forfeitures and every of them respectively." The finding of the jury was set out on the record as follows:—"That the jurors say, upon their oath, that the said Archibald Douglas is guilty of the premises charged upon him in and by each of the second, third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, thirteenth, fourteenth, seventeenth, eighteenth, nineteenth, thirty-seventh, and forty-third counts respectively of the information above specified, in manner and form, &c. And the jurors aforesaid, upon their oath aforesaid, further say that the said Archibald Douglas is not guilty of so much of the said premises as are charged upon him in and by each of the said first, fourth, twelfth, thirteenth, sixteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth,

(a) The words in brackets were in the first count, but incorporated into the second by the words "said office."

twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-eighth, thirty-ninth, fortieth, forty-first, forty-second, forty-third, forty-fourth, forty-fifth, forty-seventh, forty-eighth, forty-ninth, fiftieth, fifty-first, fifty-second, fifty-third, fifty-fourth, fifty-fifth, fifty-sixth, fifty-seventh, fifty-eighth, fifty-ninth, and sixtieth counts respectively of the information above specified, in manner and form as the said Archibald Douglas hath, by pleading for himself, above alleged. [And the said jurors, upon their oath aforesaid, do further say, that the sum of money received by the said Archibald Douglas, as in the said second count mentioned, was the sum of 8,000 rupees; and that the said sum of 8,000 rupees, at the time of the receiving thereof by the said Archibald Douglas, was of the value of 766*l.* 13*s.* 4*d.* of lawful money of Great Britain, being at the rate of 1*s.* 11*d.* for each and every of the said rupees.”] (a) There was a similar finding applicable to the other counts. The following (among others) were the errors assigned:—First, that the information is insufficient in law, and that the matters contained in the second, third, &c., counts of the said information respectively are not sufficient in law to warrant the judgment aforesaid against him the said Archibald Douglas, upon those counts respectively, or upon either of them. Secondly, that the second, third, &c., counts do not, nor does any of them, show any offence against any statute, or against any of the laws of this realm. Thirdly, that judgment is given, that, for the extortions and misdemeanors in the said second, third, &c., counts respectively mentioned, the said Archibald Douglas do pay certain fines in the said judgment in that behalf particularly mentioned, to our Lady the Queen, and be imprisoned in the Queen’s Prison for the space of twelve calendar months; and also that the said A. D., in pursuance of the statute, &c., do forfeit to our said Lady the Queen, the several sums in the said judgment mentioned, being the full value of the gifts or presents in the said second, third, &c., counts respectively mentioned; and that the said A.D. be imprisoned in the said prison, and there be kept until he shall have paid to our Lady the Queen the said several fines and every of them respectively, and also the said several forfeitures and every of them respectively; whereas such judgment is not warranted or authorized by the laws of this realm. Fourthly, that the verdict of the jurors, so far as relates to the second, &c., counts is not sufficient in law, and is not sufficient in law to warrant the aforesaid judgment, so far as the same relates to those counts respectively, and each of them. Joinder in error.

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(a) The passage between the brackets was an amendment made by consent during the argument.

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Before WILDE, C. J.; PARKE, B.; ALDERSON, B.; COLTMAN, MAULE, and CRESSWELL, JJ.; and PLATT, B., on the first day; and the same Judges, except WILDE, C. J., on the second.

Peacock's
argument.

Peacock, for the plaintiff, in error.—The first question is as to the true construction of s. 62 of 33 Geo. 3, c. 52; and it is submitted that the mere receipt of a gift by a person holding an office is not an offence under that section, unless it be received in connexion with the office, that is, by virtue or under colour of the office; otherwise a gift from one brother to another, if the latter happened to hold office in India, would subject the latter to the penalties of this statute. This information, therefore, is fatally defective for want of an averment that the gift was received *colore officii* or *extorsive*, which is always found in indictments for extortion (Co. Lit. 368 *b.*) [PARKE, B.—But this is after verdict, and the information follows the words of the statute.] The 21st sect. of 7 & 8 Geo. 4, c. 64, does not apply. It applies to indictments or informations for felony or misdemeanor; but this is an information for forfeitures. [ALDERSON, B.—The offence is a misdemeanor, and the forfeiture is only part of the punishment.] That statute, at all events, applies only to felonies and misdemeanors committed in this country. [CRESSWELL, J.—Would it not to murder on the high seas? MAULE, J.—If the trial of the indictment or information is in England, the case is within the statute.] *Peacock* referred to ss. 140 and 141 of the 33 Geo. 3, c. 52, to show that the mode of proceeding in India is different from that adopted in England, and that this offence might have been prosecuted there. If the view taken by the Court of Queen's Bench is right, the statute would apply to presents from England if received in India. [ALDERSON, B.—Why is it to be restricted to presents in India?] They are alone contemplated by the statute; and if the words in the statute are so large as to comprehend cases clearly not within it, it is not sufficient in an indictment to follow the words of the statute: (*Rex v. McGregor*, 3 Bos. & P. 106.) Here the statute makes the receipt of certain gifts extortion; but it does not do away with the necessity of making the information a good information for extortion at common law. In *Reg. v. Baynes* (Salk. 680, 681), it is said that “a man cannot be charged with extortion without charging him with acting *extorsive*, and that *extorsive et colore officii* are words as necessary as “*proditorie et felonie*.” [PARKE, B.—Would not the 62nd section apply to a gift to a judge; and yet that would not be *extorsive*? PLATT, B.—The words are, that the receipt of the gift shall be ‘deemed and taken’ to be extortion. It is not extortion within the definition of that offence in *Beaufage's case* (10 Rep. 102 *a.*)] *Fletcher v. Calthrop* (6 Q. B. 880), is another authority to show that it is not sufficient to follow the words of the statute. (He also referred to Com. Dig. Extortion.) 2. The information is bad for not showing “for whose use” the gift was received. [PARKE, B.—The statute says, for

whose use soever it is received, it shall be deemed extortion.] It is consistent with this information that the gift may have been received for the use of the Queen. This shows the necessity of the averment. [PARKE, B.—The word “person” must be construed to include the Queen. MAULE, J.—Officers of the court are prohibited from receiving gifts not only pretended to be for other persons, but which really are so.] The information ought, at all events, to state whether it was received by the defendant for himself or for the use of some other person; otherwise it does not follow the words of the section, and upon that ground the 7 & 8 Geo. 4, c. 64, s. 21, does not apply: (Com. Dig. Inform. D. 3.) 3. The information does not state whose money was received. [PLATT, B.—How can that be material? It may have belonged to several.] *Reg. v. Martin* (8 Ad. & Ell. 481), is an express authority. [MAULE, J.—The gift must certainly be described. But here it is described as 8,000 rupees. PLATT, B.—Why is it more necessary in this case to state whose property was given than in an indictment for bribery or a plea of payment?] *Reg. v. Parker* (3 Q. B. 292), requires it: Russ. on Cr., p. 695 n.) If it was not known whose money was received, the averment might be in that form. Restitution may be part of the sentence; but to whom is restitution to be made, except the party whose money was received? (*King v. Reg.* 7 Q. B. 782, 795; 14 L. J. M. C. 172.) The party might receive his own money. [PARKE, B.—It is not a gift if the party receives his own money.] *Dixie’s case* (1 Lev. 95), is another authority. The second important question arises upon the judgment, which forfeits the value of the rupees. The words of the act of Parliament are, that the offender “shall forfeit the whole gift or present so received, or the full value thereof;” and the judgment ought to be in the same terms, so as to give the defendant the option of forfeiting either the gift or its value. The judgment should be like the judgment in *detinue*, for the chattel or its value. [MAULE, J.—Is this a “valuable thing” received as a gift, or is it a “sum of money?”] It is a foreign coin which cannot be treated as a sum of money, because the value of it varies; it depends upon the exchange. The judgment should have been a forfeiture of foreign coins called rupees, or of their value: (*Attorney-General v. Lane, Parker*, 57.) Under sect. 63, an order may be made to restore the thing forfeited. If, therefore, the crown has the option, and a horse, for example, which was dead at the date of the judgment, was forfeited and ordered to be restored, a perpetual imprisonment might be the consequence. Here the crown has made the selection, and the information is wrong: (*Pie v. Westley*, Hob. 245.) If the court had the discretion, the wrong thing is claimed; but at all events the forfeiture is no part of the punishment upon this information. The forfeiture may be levied by process; but there is no power to imprison until payment. In treason and felony the forfeiture is a consequence and not part of the judgment: (33 Hen. 8, c. 20). The offence is made extortion, and “to be proceeded against and

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punished as such." Then, in addition to that punishment, the statute provides that the gift shall be forfeited; but the usual proceedings to recover a forfeiture must be taken, in order to enforce the latter part of the clause; and there is no doubt that if the thing forfeited came into the hands of a third party, an information in *devenerunt* might be filed at the suit of the crown or its grantee to recover either the gift or its value: (Manning, Exch. Pr. 165, 166.) This judgment should, therefore, have omitted the forfeiture altogether, or followed the words of the statute. (He referred to 8 Ann. c. 9, s. 75, and 7 & 8 Geo. 4, c. 53, s. 69.) [MAULE, J.—May not the clauses as to forfeiture and restoration be subject to the implied exception "if the thing exists." Besides, it is not clear that this is a case of forfeiture, strictly speaking.] The rupees are chattels. [MAULE, J.—Not so; the defendant could not have insisted on receiving the particular rupees.] The court may order them to be given back. [MAULE, J.—Sect. 63 puts the chattels and their value and the fine upon the same footing. It is not cumulative.] As the case stands at present, both the thing and the value may be required of the defendant; for the value is forfeited, and the thing itself may be ordered to be restored to the giver. [MAULE, J.—Does it mean more than this, that when the forfeiture is levied the court may order restoration to the giver?] At all events there is no power to order imprisonment until the forfeiture is paid. [PARKE, B.—Assume the judgment to be incorrect in that respect, will it vitiate the whole judgment? ALDERSON, B.—That matter was argued in *O'Connell's case*, but not decided.] The cases are collected in 11 Cl. & Fin. 212; Bacon, Ab. Error, M. 1; here there is one entire sentence of imprisonment until all the fines and forfeitures are respectively paid. Therefore, if any part is bad, it is bad altogether, and judgment must either be affirmed or reversed: (Vin. Ab. Error (B.) b, pl. 18, 19; *Pollett v. Forrest*, 17 L. J. Q. B. 291, 12 Jur. 560; *Parker v. Harris*, Carth. 234; *Goodier v. Platt*, Cro. Car. 470.) Lastly, as to the value of the rupees, it ought to have been estimated at the date of the conviction, not at the time of receiving the present: (a) (Com. Dig. Forfeiture, B. 6.) There could be no election whether to forfeit the thing or the value before conviction; and then the present value ought to be taken. The verdict is the conviction: (2 Saund. 148, 148 c, 6th ed.) [MAULE, J.—Suppose the goods to have been destroyed before the conviction, what would be the value of them?] Nothing; but this is a very penal statute, and the forfeiture is not a part of the punishment of the offence. [MAULE, J.—Suppose the judgment to be given in the alternative for the thing received as a gift or its value, surely that would mean its value when received.]

Sir F. Thesiger, contra.—This information is in the form held good in *Rex v. Stevens & Agnew* (5 East, 244); and the judgment follows the form given in 4 Chit. Crim. Law, 371. The previous

(a) The record did not state that the jury had found the value; but it was amended by consent.

stat. 13 Geo. 3, c. 63, is confined to Asiatics; and the object of the 33 Geo. 3, c. 52, s. 62 was to extend the provisions of the 24th section of the former act to all persons holding any office or employment. The object of the section is not limitation but extension, and therefore the words are introduced, "whether it be for the use of the party receiving the same, &c., or of any other person." This information pursues strictly the words of the act, and therefore, after verdict, 7 Geo. 4, c. 64, s. 21, cures all defects. That statute is applicable to every indictment or information which can be tried in this country, though the offence may be committed out of it. (He referred also to sects. 23 & 24.) It is possible that the words of the 62nd section, taken literally, may include some cases which would not be within the intention of the Legislature; but certainly many gifts from near relations might be within the meaning of the statute, and it would be impossible to frame words admitting one but excluding the other class of cases. The information, therefore, is sufficiently certain, without explaining the nature of the gift or the person from whom it came. Neither is an allegation necessary that the gift was received *extor-sine* or *colore officii*: the class of cases referred to in Co. Litt. 368 b, and 10 Rep. 102 a, is entirely different. It is not received *colore officii* in the sense there adverted to, but on account of his filling the office. [MAULE, J.—You say that the statute makes the receipt of the present by the officer conclusive evidence that it has all the requisites of extortion without setting them out.] Secondly, it is immaterial whose money was received, and the cases cited relating to larceny and embezzlement are not applicable. *Ex vi termini* in this case it cannot be the party's own money, because, if so, it would not be a gift. If it would be a gift, then it is within the statute. [PLATT, B.—In a plea of payment the money is not described as the money of the party paying. PARKE, B.—You need not trouble yourself as to any of the points disposed of in the judgment of Lord Denman, excepting the question whether it is necessary to say for whose use the money was received, so as to exclude the Queen; but the main difficulty is as to the mode in which judgment has been entered on the record since it was pronounced.] The answer to the objection that the information ought to have excluded a receipt for the use of the Queen is this, that sect. 62 is not restrictive but enlarging; its object is to include every possible case. If the words "whether it be for the use of the party, &c.," had been omitted altogether, it certainly would not have been necessary to negative a receipt for the use of the Queen, and the insertion of them cannot render it so. Presents may be made to the Queen directly, notwithstanding this clause, which only prevents the transmission through a particular channel. [PARKE, B.—Then you say that the word "person" includes the Queen.] Yes; for this is not a statute in derogation of the rights of the crown; but for the prevention of wrong: (Vin. Ab., Statute E. 10.) The statute would be inoperative if parties could shelter themselves under a pretence that it was received for

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the use of the Queen. The next question relates to the entry of the judgment; and the first objection is that the forfeiture is not in the alternative "of the gift or its value," but of the value only. That rests upon the ground that the offender is to choose; but the absurdity of that contention is obvious. If the gift has been fully enjoyed, and all the value taken out of it, of course the offender would elect to give up the thing. The judgment in *detinue* is in the alternative for the benefit of the plaintiff, because the goods may have been destroyed. It has no analogy to the sentence upon an offender. [PARKE, B.—Then you say, if the crown was to elect it has elected; and if the court, the court has elected.] The defendant might have been tried in India; and there rupees are current money. [MAULE, J.—Whatever difficulty there may be in the case of a chattel, it does not strike me as arising with regard to the value of money.] The record is now amended by a finding of the value at the time of the receipt; and it is objected that the judgment is equally bad, because the value, at the time of conviction, ought to have been estimated. [PLATT, B.—In ascertaining the treble value of goods, under the statute of 12 Anne, st. 2, c. 16, the value must be taken at the time of the usury committed. MAULE, J.—In India the defendant would clear the forfeiture by paying so many rupees; and if he is to be placed in the same position here, as he would occupy there, he ought to be able to clear the forfeiture by paying the value of so many rupees, at the rate of exchange at the time when the payment might have been made in India. ALDERSON, B.—The value, at the conviction and at the receipt, would in India be the same. MAULE, J.—We cannot consider rupees as having a varying value, and the defendant ought to pay so many rupees as he received, whether their value has altered or not. The forfeiture is so many rupees, or their equivalent in England, and that, perhaps, should be their present equivalent; but the value at the present time, and at the time of the receipt, may be intended to be the same.] The only remaining question is, whether the sentence of imprisonment, until the forfeiture is paid, can be sustained. Now, here the forfeiture is a part of the punishment, and is not like a forfeiture under revenue acts, or the forfeiture consequent upon a conviction for felony. The ordinary punishment for misdemeanor is fine or imprisonment, or both; but this act imposes an additional punishment. There is no question, that if this were a fine imprisonment might be ordered until it was paid: (*Rex v. Wilkes*, 4 Burr. 2527, 2576; *Rex v. Woolf*, 1 Chit. 401, 428.) Here there is no distinction between the forfeiture and a fine; it becomes a debt to the crown as soon as judgment is pronounced. If there were not this power, how could the 63rd section be enforced. [MAULE, J.—Is any instance known of an information *in rem* upon this statute? There may be a question whether the penalty is not intended to be pecuniary in every case; the gift mentioned in the first part of the section is a sum of money, or other valuable thing; and the latter part may mean

that the offender shall forfeit either the money, or if the gift were a valuable thing, then the value of it, leaving no option to him, or any one else, to deal with anything but the money. That would remove all the difficulty about an option, or about proceedings *in rem*. ROLFE, B.—Section 141 seems to assume that every forfeiture must be *a sum*.] At the end of that section there are words which show that offenders may be proceeded against as for ordinary misdemeanors. [CRESSWELL, J.—In the report of *Rex v. Stevens & Agnew* (5 East. 244), the information does not appear to be for misdemeanor.] Upon reference to the brief, it appears that the information in that case charged the offence as extortion only, not as a misdemeanor; but the judgment was for the “extortions and misdemeanors, &c.” [CRESSWELL, J.—Here it is not said for what the forfeiture is adjudged.] The judgment sufficiently shows that the forfeitures are referable to the several misdemeanors charged; and section 62 seems to show that the forfeiture is a part of the punishment, for that all was intended to be done by the court at the same time. [PARKE, B.—It is unnecessary, in passing sentence for misdemeanor, to say “for the said offence.” MAULE, J. referred to *O’Connell’s case*. ALDERSON, B.—Upon looking to the case of *Rex v. Stevens*, it is clear that the court thought the forfeiture part of the punishment for misdemeanor; because there, there were several counts, only one of which charged a receiving; and the judgment of forfeiture is appropriated to that count. The other counts charged only a demanding, to which offence no forfeiture is attached.]

Peacock, in reply.—The case of *Rex v. Stevens & Agnew* is no binding authority; because the mode of entering the judgment was not at all discussed. The second count, and subsequent counts, do not sufficiently show that the defendant held an office within the statute. The first count, upon which the defendant has been acquitted, states that the defendant held a certain office in the East Indies, under the East India Company, to wit the office of resident at Tanjore; but the second count merely states that he held the said office of resident.

ALDERSON, B.—The first count is not struck out of the information.

MAULE, J.—The word “said,” incorporates, in the second count, the whole of the sentence referred to. *Cur. adv. vult.*

PARKE, B., on the following day, delivered judgment.

This was an information against the defendant, founded upon the statute of the 33 Geo. 3, c. 52, s. 62, and in the argument before us, the objections taken on the part of the defendant, are both to the form of the information, and also to the form of the judgment. With respect to the objection to the form of the information, which was the only matter before the Court of Queen’s Bench, we concur entirely in the judgment of that Court. The objections which were taken to the form of the information were, first, that according to the law it is not enough to follow the words of the statute, but you

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must describe an offence within the meaning of the statute; and Mr. Peacock contended that the meaning of the statute was to prohibit presents being received by officers in the East Indies only where they were extorsively received, or received under colour of office. Now, supposing that was so, and that the information applied only to such cases, we are all of opinion that the information would be good in that respect by virtue of Sir Robert Peel's Act, the 7 Geo. 4, c. 74, and that that statute applies as well to informations preferred for offences abroad as for offences in England, if those offences can be tried in England; therefore, supposing that to be the true construction, so far as this objection is concerned, the information is good. But we also concur in the opinion of the Court of Queen's Bench, that the meaning of the statute is not to be so limited, and that the object of the Legislature was to prevent a person receiving any gift, or present, or sum of money in the East Indies (he being an officer of the Government or of the East India Company) absolutely, whatever the reason for that gift might be; and that the object of the Legislature was to put an end to a practice that was considered derogatory to the character of the East India Company in the East Indies, and to the crown, although the object could not be effected possibly without implicating some innocent persons, as in the case, which was stated by Mr. Peacock, of a person receiving a present from a friend or a relative. But the Legislature thought it right to prohibit the practice, in order to prevent the great mischief arising from their officers receiving presents at all; and it was thought by the Legislature, looking at the balance of convenience and inconvenience, that great advantages were obtained by putting an end to gifts altogether, though it might be at the expense of some occasional mischief to innocent persons. The remedy was in the hands of the crown; and the Attorney-General might enter a *nolle prosequi* on that indictment, if any should be preferred, for the offence of receiving a present, the motives of the person being perfectly innocent. We entirely concur in the reasons given by Lord Denman in his judgment upon that part of the case. Then it is contended that this information was defective because it does not follow the words of the statute, and also that it is defective in substance, because it does not state for whose use the money was received. We think that the answer given to that objection by Sir Frederick Thesiger is quite satisfactory. Those words are introduced for the purpose of excluding any possible excuse that may be made for receiving a present, the substance of the offence being the act of demanding or receiving a present. Upon this part of the case my brother Platt feels some doubt, but the rest of the court are clearly of opinion, that this is the true construction of the statute; consequently, we think that if a person receives a present under colour of its being a present to the Queen, he would be within the meaning of the statute. These being the objections to the form of the information we think that they are answered, and that the form of the information is good. Then the

next objection, and one which occupied much more time, was, whether or not the judgment was a proper judgment in this case. The jury are stated to have found that the value of a rupee at the time of the receipt was 1s. 11d., and the court in proceeding to give judgment, after imposing a fine for each misdemeanor, in each count, proceeded to state and to give judgment also for the value of the forfeiture, taking the value, as the jury found it, at the time of the receipt, and they proceeded to pass sentence of imprisonment till the fine was paid and until the forfeiture was paid. Mr. Peacock's objection is, that there is an alternative in this case, which alternative ought not to be exercised by the court; or that at all events, sentence of imprisonment is limited by what he assumes to be the alternative found by the court, namely, the forfeiture and payment of money, instead of the value of the gift; and that it is erroneous in the court to pass judgment of imprisonment till that is paid. First of all, with respect to the alternative, he says in this case that there is an alternative. Now the words of the 62nd section, and the rest of the statute, indeed, are not clear; but we think it perfectly clear that in this case there is no alternative, because the sum received was money, and whatever question there may be as to valuable things, there can be no question with regard to money. In the case of money it is a forfeiture of the money, and no alternative at all presents itself for the crown to exercise an option in framing the information, or for the court to exercise an option in case the party is convicted. This is a forfeiture of money, and we need not embarrass ourselves with the nice questions raised by Mr. Peacock with respect to the alternative. The only question remaining as to the money is, at what time the estimate of that money as a gift is to be taken; whether it is to be at the time of the conviction, or at the time of the receipt of the money, and we are all of opinion that the true time at which to estimate the value is the time of the receipt; for if it had been the gift of a chattel, and the chattel had perished or diminished in value before the conviction, or become of no value at all, then if we took the estimate of it at the time of the conviction, there would be no forfeiture at all; and we think that the true meaning of the statute is, that he forfeits the sum of money received, and that the sum of money is to be estimated as of the value which it bore at the time of the receipt. If this had been an indictment which had been tried in the East Indies, the sum forfeited would be, no doubt, the precise amount of rupees, rupees being the currency of the East Indies, and it is presumed that the currency does not vary in value; but as the sentence is to be passed in England for the receipt of current money in the East Indies, it becomes necessary to estimate the money in England, and we think that the true mode of estimating that is by taking the value at the time of the receipt. That the jury have found; and the court, in giving judgment for the amount of the forfeiture, valued that money at the time of the receipt, and for that forfeiture the crown might maintain on this record an action of debt. Then the only remaining question is,

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whether the court can also pass sentence of imprisonment until that debt be paid. We think, that the true meaning of this clause is, that they may superadd the amount of the forfeiture to the fine—it is not a fine arbitrarily imposed by the court, but a fine fixed and imposed by statute for that offence—and, consequently, the court have a right to pronounce judgment for the nonpayment of the fixed fine, as well as for the arbitrary fine. The court possess that power; and we think that the judgment is good. It is satisfactory to find that we are not without a precedent in this case (*The King v. Stevens and Agnew*); and the result is, that the judgment of the Court of Queen's Bench must be affirmed.

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Platt, B.

PLATT, B.—The only doubt that I entertained at the time, and entertain now, is with reference to the goodness of these counts. The section of the act of Parliament upon which they are framed enacts, that the demanding or receiving any sum of money or a valuable thing, as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for or pretended to be for the use of the said company, or of any other person whatsoever, by any British subject, holding or exercising any office or employment under His Majesty, or the said united company in the East Indies, shall be deemed and taken to be extortion, and a misdemeanor. Now I own that in construing that section of the act, I cannot bring myself to imagine that the word “person” included His Majesty of that day, and therefore it seems to me, inasmuch as there are two cases which would not be within this section, and still would be consistent with the words of these counts—it seems to me, I own, though I ought to speak very doubtfully of my own opinion, that these counts ought not to be maintained, because if the section is looked to, and it was intended by that section to include His Majesty, surely this would have been the form of the section: “to be for the use of the party receiving the same, or for the use, or pretended to be for the use, of His Majesty” (that would stand first) “or for any other person whatever;” but instead of that, “person” here is used after “the company,” which, according to the ordinary rules of construction, must mean persons *ejusdem generis*, that is to say, they must be a portion of the subjects of Her Majesty; therefore it seems to me, that there are two cases—where a present is actually received for the use of Her Majesty, or where it is pretended to be received for the use of Her Majesty,—which do not fall within the terms of this section; and if that be correct, then undoubtedly the statement upon these counts is quite consistent with either the one case or the other, in either of which cases the party is not within the object of the act of Parliament. Undoubtedly, in the second case, the pretence of its being received for Her Majesty would be within the mischief sought to be prevented by the act of Parliament; but I cannot conceive that, where a present has been actually received *bonâ fide* for the use of Her Majesty and has been brought here for the purpose of her receiving it, it was the meaning of the act of Parliament to prevent that; and there-

fore though, as I said before, speaking very doubtingly as to my own opinion, that has strengthened the impression on my own mind, and with regard to that part of the case, and that alone, I entertain considerable doubt.

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v.
THE QUEEN.

Judgment affirmed.

CROWN CASE RESERVED.

November 11, 1848.

(Before POLLOCK, C. B., PATTESON, MAULE, CRESSWELL, and ERLE, JJ.)

REG. v. GARNER. (a)

Admissibility of confession—Inducement.

Upon the trial of an indictment for attempting to poison, the only evidence of intent was a confession proved by a medical man, he denying at first that he had held out to the prisoner any inducement to make the statement. It was afterwards proved by another witness, that before the statement was made, the surgeon had said to the prisoner in the presence of her mistress (whom she had attempted to poison), "it will be better for you to tell the truth;" and the surgeon, on being recalled, admitted that he might have said so. The learned judge refused to withdraw the confession from the jury, and the prisoner was convicted; but the learned judge reported, that if the surgeon had in the first instance stated that he had used that expression to the prisoner, he should not have received the confession.

Held, that the conviction was wrong.

THE prisoner was convicted before Patteson, J. at the last Lincoln assizes; but the learned judge doubting the correctness of the conviction, reserved the following case for the opinion of the judges:—This was an indictment against the prisoner, a girl of the age of thirteen, for administering poison to her mistress, Mary Smith, with intent to murder her. It was proved that the prisoner had given her mistress, who was bed-ridden, some milk, in which a quantity of fag-water had been mixed. Fag-water is a mixture of arsenic, soft soap, and water, used for dressing sheep. But in order to prove that the prisoner had put fag-water into the milk—that she knew the nature of it, and intended to murder her mistress—her own confession to Mr. Gilby, a medical man, who attended her, made in the presence of the

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Evidence.
Confession.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law. This case was reserved before the new statute (11 & 12 Vict. c. 78) was passed.

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prisoner's mistress, and her husband, was offered in evidence. Mr. Gilby, on being questioned, swore, that he did not tell the prisoner that it would be better or worse for her to tell—that he used no threats or promises, nor did any one else; and it appeared before Mr. Gilby's arrival, that the prisoner had not made any confession, nor had any threats or promises been held out to her. I admitted Mr. Gilby's statement, which was as follows:—"I asked her if she had given the woman anything in her milk. She said she had mixed fag-water with the milk. She had put in half a tea-cup full. I asked her if she was aware of the nature of it. She said she knew it was poison. She thought it would kill the woman; that she had done it to be released from her service."

A woman of the name of Brampton was then called who was also present at the conversation, and she swore, that Mr. Gilby told the prisoner, in the presence of the mistress and her husband, *that it would be better for her to speak the truth*. She could not tell whether he told her so before he asked her what she had done; *but it was before she answered*. I then recalled Mr. Gilby, and in answer to my questions, he said, "I could not positively swear that I did not tell the prisoner that it would be better for her to tell the truth. I don't recollect that I did. I can't say positively what was the first thing I said to her. *I believe I asked her what she had put into the milk. It was very likely I might tell her it would be better for her to tell the truth.*" Smith, and his wife, the mistress, were both present, and heard what I said."

Smith, who had been examined as a witness, could not recollect what was said.

The counsel for the prisoner contended, that I ought to strike the confession out of my notes; and not submit it to the jury.

The following cases were cited:—*Spencer's case* (7 C. & P. 776); *Sarah Taylor's case* (8 C. & P. 733), *Reg. v. Laughier* (2 Car. & K. 225.)

After consulting with Lord Denman, I declined to strike out the evidence of the confession, and put the whole to the jury, feeling that it was impossible after they had heard the confession, to expect that they could weigh and consider the other facts in the case without reference to the confession; and in fact those other facts by themselves would not have warranted a conviction.

The deposition of the mistress, which had been taken by a magistrate, in the presence of the prisoner, and which mistress was proved to be incapable of being removed, and to be in a hopeless state under a disease of dropsy, was then read, detailing the same conversation between Mr. Gilby and the prisoner, but not stating anything with regard to the use of threats or promises.

The jury found the prisoner guilty, and I have to request the opinion of the judges, whether I was right in the course I adopted.

Flowers for the prisoner.—1. The inducement was such as to exclude the confession. In *R. v. Laughier* (2 Car. & K. 225), the words used were, "if you know anything about it, tell the

truth," and the statement was rejected. Here the words are stronger.

POLLOCK, C. B.—The question there was not upon the effect and meaning of the words, but whether they were spoken by a person having authority.

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MAULE, J.—There can be no doubt that such words, if spoken by a competent person, have been held to exclude a confession, at least 500 times.

ERLE, J.—I believe several judges have held, and it certainly is my opinion, that an exhortation to tell the truth cannot be considered as an inducement to confess untruly. But it is for the judge at the trial to decide upon all the circumstances, whether the words were so used as to operate upon the mind of the prisoner as an inducement to confess untruly.

PATTESON, J.—There is a case in 4 Car. & P. (*Rex v. Kingston*, p. 387), where a surgeon said to the prisoner, "you are under suspicion of this, and had better tell all you know;" and my brothers, Parke and Littledale, rejected the prisoner's statement.

Flowers.—That is precisely in point.

POLLOCK, C. B.—If the surgeon in this case had originally stated that he had used the words, "you had better tell the truth," my brother Patteson would not have received the prisoner's statement.

PATTESON, J.—I have no hesitation in saying, that if the surgeon had in his original statement acknowledged the use of the words afterwards proved, I should not have received the prisoner's confession; but that confession was properly received at the time when it was proved; because the surgeon at first denied that he had held out any inducement. I have no doubt that the affirmative lies upon the prisoner, who is bound to prove that the inducement was held out; but here that was affirmatively proved after the confession had been received; and if that confession ought not to have been received, the prisoner was entitled to an acquittal, because there was no other evidence of intention, or of malice, which was required to supply the want of age.

Flowers was then stopped.

No counsel was instructed to argue on the part of the crown.

POLLOCK, C. B.—I believe that we are all of opinion that the conviction cannot be sustained.

Conviction reversed. (a)

(a) That evidence received by mistake, may be struck out from the judge's notes. (See *Jacobs v. Layborn*, 11 M. & W. 685; *Stone v. Blackburn*, 1 Esp. 37; *Howell v. Lock*, 2 Camp. 15.) As to inducements to confess, see *R. v. Shepherd* (7 Car. & P. 579); *R. v. Partridge* (ib. 553); *R. v. Taylor* (8 Car. & P. 733); *R. v. Drew* (8 Car. & P. 140); *R. v. Dunn* (4 C. & P. 543); *Meynell's Case* (2 Lewin, 122); *R. v. Pountney* (7 Car. & P. 302); *R. v. Upchurch* (R. & M. C. C. 465); *R. v. Row* (Russ. & Ry. 153); *R. v. Thomas*; *R. v. Spencer* (7 Car. & P. 776); *Reg. v. Boswell* (1 Car. & M. 584); *Reg. v. Dingley* (1 Car. & Kir. 637).

CROWN CASE RESERVED.

November 11, 1848.

(Before POLLOCK, C. B., PATTESON, MAULE, CRESSWELL, & ERLE, JJ.)

REG. v. ORLANDO MASTERS. (a)

Embezzlement—Possession of master—Reservation of case by a Recorder under 11 & 12 Vict. c. 78.

If a servant, in the course of his employment, receives from a fellow servant the money of his master, and, his duty being to hand it over to another servant of the prosecutor, by whom it would be delivered to the master, he fraudulently intercepts it in its passage and appropriates it, he is guilty of embezzlement.

Per PATTESON, J.—The Recorder of a borough has the same jurisdiction to reserve a case under 11 & 12 Vict. c. 78, as any other court of quarter sessions.

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MASTERS.
—
Embezzlement.
—
Reservation
of case.

THE prisoner was indicted for embezzlement at the Michaelmas Quarter Sessions for the borough of Birmingham; and upon the trial a question of law arose upon which the learned recorder submitted to the judges the following case.

The Recorder of Birmingham respectfully submits for the consideration of the learned judges two questions of law.

1st. Whether under the 11 & 12 Vict. c. 78, ss. 1 and 2, questions of law may be reserved by recorders.

2ndly. Whether the conviction of Orlando Masters was a good conviction.

Case reserved.

As to the first question. The power to reserve is not in express terms given to recorders, and it may be contended that the courts of quarter sessions mentioned in the act, are courts composed of justices of the peace. On the other hand it may be replied that the first section, when enumerating the courts to which the power is given, uses the word "any," which would seem to override the whole class enumerated, and consequently apply to courts of quarter sessions; and that the second section enacts that the court of quarter sessions shall state the case. In boroughs this court consists of the recorder sitting as the judge: (5 & 6 Will. 4, c. 76, s. 105). He is moreover, *ex officio*, a justice of the peace: s. 103. It would thus appear that borough sessions are within the words of the act, and the absence of any express distinction between county sessions and borough sessions might be urged to show that no such distinction was intended. Indeed it would be

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law. This was the first case reserved under 11 & 12 Vict. c. 78.

difficult, if not impossible, to find any motive for withholding a power from recorders' courts which is thought necessary to the due administration of justice in courts exercising similar jurisdiction.

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As to the second question the case is as follows:—Orlando Masters, a clerk in the employment of William Holliday, was tried at the last Michaelmas Quarter Sessions for the borough of Birmingham, on an indictment charging him with embezzling three sums of money received by him for and on account of his master, the prosecutor.

Reservation
of case.

It appeared in evidence that the course of business adopted by the house was for the customers to pay moneys into the hands of certain persons, who paid them over to a superintendent; he accounted with the prisoner and paid over such moneys to him, and the prisoner in his turn accounted with cashiers and paid over the moneys to them, he having no other duty to perform with respect to such moneys than to keep an account which might act as a check on the superintendent and the cashiers; these accounts being in like manner checks on him. These four parties to the receipt of the moneys are all the servants of the prosecutor.

Case reserved.

With respect to the three sums in question, it was proved that they passed in due course from the customers through the hands of the immediate receivers and the superintendant to the prisoner, who wilfully and fraudulently retained them.

On behalf of the prisoner it was objected on the authority of *Rex v. Murray* (1 Moody's C. C. 276), that the moneys having, before they reached the prisoner, been in the possession of the prosecutor's servants, did in law pass to the prisoner from his master, and that consequently the charge of embezzlement could not be sustained. For the crown it was answered that the prisoner having intercepted the moneys in their appointed course of progress to the master, this case was not governed by that of *Rex v. Murray*. There, the prior possession of the master having been as complete as it was intended to be, the money might reasonably be considered as passing from the master to the prisoner, whereas in the present case it was in course of passage through the prisoner to the master.

The Recorder left the case to the jury, reserving the point. The prisoner was convicted and sentenced to twelve months imprisonment with hard labour.

M. D. HILL, Recorder of Birmingham,
November 3, 1848.

Miller (with whom was *Mellor*), in support of the conviction.—
1. The doubt suggested as to the power of recorders to reserve a case under 11 & 12 Vict. c. 78, originates with the Recorder himself; it is not an objection made on the part of the prosecution; but it rests upon the language of the section which gives the power to commissioners of oyer and terminer and the *justices of the peace*, not mentioning recorders; and upon the form of certifi-

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cate prescribed in the schedule to the act, which certainly alludes only to county justices.

MAULE, J.—Does the clause require the certificate to be in that form?

Miller.—With necessary alterations to adapt it to particular cases. The commencement of the first clause certainly speaks of indictments, “before *any* court of oyer and terminer or gaol delivery or court of quarter sessions;” but the word “any” does not over-ride the whole sentence. 2. The prisoner in this case was at all events rightly convicted under the 7 & 8 Geo. 4, c. 29, s. 47. All the requisites of the statute were complied with. The prisoner received the money by virtue of his employment and for and on account of his master. This is the very case which the statute was intended to meet; for the original taking was not tortious; and the money had not been reduced into the possession of the master, otherwise than by the possession of his servant. In a certain sense it may always be said that the money embezzled has come into the possession of the master, because the money reaches the hands of the fraudulent servant; but, by the statute, that is not such a possession of the master as to make the offence a common law larceny instead of embezzlement. The statute contains a special provision authorizing the insertion of three cases in one indictment; but that clause will apply to cases of larceny, if the argument urged for the prisoner in this case should prevail. *Rex v. Murray* is quite distinguishable. (He was then stopped.)

No counsel was instructed to argue on the part of the prisoner.

POLLOCK, C. B.—We are all agreed that the conviction is right. This is not at all one with the case of *Rex v. Murray* (1 Moo. C. C. 276; 5 Car. & P. 145), where the prisoner had received money from another clerk on behalf of the master that he might employ it for a particular purpose. That case was held not to be within the statute, because the master had had possession of the money by the hands of another clerk; but in this case I quite adopt the expression of the learned Recorder, that the money was in course of progress, or on its way to the master. It appears that the course of business was this,—that the money is originally received by one servant, whose duty it is to hand it to another, and that so it is handed from one person to another until it gradually reaches the hands of the cashier. The prisoner was one of those into whose hands it came in the course of transit; he received and embezzled it; and it seems to me the conviction is right.

PATTESON, J.—I entirely concur in the opinion expressed by the Lord Chief Baron. *Rex v. Murray* was quite a different case. There, there was, in truth, a delivery by the master to another person, and by him to the prisoner, who received the money, not on account of the master, but to pay to a third person. Here it was clearly received on account of the master. As to the other point the jurisdiction is as plain as it can be. The Recorder is a justice of the peace *virtute officii*.

Conviction affirmed.

CROWN CASE RESERVED.

December 9, 1848.

(Before POLLOCK, C. B., PARKE, B., PATTESON, CRESSWELL,
and WILLIAMS, JJ.)

REG. v. GEORGE YORK. (a)

Larceny—Finding stolen property—Special verdict equivalent to “not guilty.”

A. was indicted for stealing a watch; for the defence it was suggested that he had found it, and retained possession of it for the purpose of restoring it to the owner; the jury returned the following verdict in writing:—“We find the prisoner not guilty of stealing the watch, but guilty of keeping it in hope of reward from the time he first had the watch;” the court directed a verdict of “guilty” to be entered.

Held, that the finding amounted to a verdict of “not guilty,” and that a verdict of “not guilty” ought to have been entered.

AT the General Quarter Sessions of the Peace for the county of Northampton, held at Northampton on Wednesday the 10th day of October, 1848, before the Most Hon. Joshua Alwyne, Marquis of the county of Northampton, Henry Barne Sawbridge, Esq., The Right Hon. Robert Vernon Smith, The Hon. Phillip Sydney Pierrepont, Sir Robert Henry Gunning, Bart., and others their fellows, justices of our said Lady the Queen, assigned to keep the peace in and for the said county of Northampton,

George York, then late of the parish of Boughton in the said county, labourer, was arraigned upon a certain indictment which in the first count charged him, the said George York, with feloniously stealing at Boughton aforesaid, on the 27th day of June, in the twelfth year of Her present Majesty's reign, one silver watch of the value of 5*l.* of Joseph Warren; and in the second count with receiving the said watch well knowing the same to have been feloniously stolen. The prisoner pleaded not guilty to the said indictment, and was put upon his trial for the same. The evidence against the prisoner seemed to prove that he had found the watch, and had subsequently appropriated it to his own use, and the question thereupon submitted by the counsel for the prosecution, to the court and jury was, that if at the time the prisoner found the watch he took possession of it with a view of stealing it, or if he found the watch and intended to detain and keep it until a reward was paid for the same, then the prisoner had committed a larceny. The jury, after hearing counsel on behalf of the prisoner, retired to consider their verdict, and upon

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YORK.
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Case reserved.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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their return into court, delivered a special verdict in writing, of which the following is a copy. The words *in italics* having been subsequently added by the jury after explanation by the court with the jury.

“Not guilty of stealing the watch, but guilty of keeping possession of it in the hope of reward *from the time he first had the watch.*”

The second count was abandoned by the counsel for the prosecution, and the jury found the prisoner on that count “not guilty.” The counsel for the prisoner then moved the court that the prisoner should be forthwith discharged; the special verdict being one which amounted in law to a verdict of acquittal. The court, after hearing the argument of the prisoner’s counsel, and also the counsel for the prosecution, in reply thereto, decided that the verdict amounted to a verdict of guilty, and the following entry was made upon the record:—“Guilty; judgment to be reserved until the next sessions; in the meantime a case to be submitted to the judges. The prisoner to be admitted to bail, himself in 100*l.* and one surety in 50*l.*, conditioned for the appearance of the said George York, to appear at the next sessions and abide the judgment of the court.” The prisoner, with a surety then in open court, forthwith entered into the required recognizances, and was discharged. And in pursuance of the act of Parliament, 11 & 12 Vict. c. 78, the facts of the case were directed by the court to be laid before the justices of either bench, and the barons of the Exchequer, for the purpose of their deciding whether the opinion of the court upon the said special verdict, as above delivered, was or was not correct.

Flood, for the prisoner.

The Court called on

K. Macaulay, for the Crown.—The finding shows that the prisoner kept the watch for the purpose of obtaining a reward for giving it up. His intention, then, was, not to give it up to the owner so soon as he should find him, but to give it up provided he got a reward for so doing. The finding shows that the intention with which the prisoner kept the watch was the same as that with which he took it. There was, then, a taking in the hope of gain, and the mode in which the benefit is to accrue to the taker is immaterial. This is not a special verdict, but a mere colloquy.

POLLOCK, C. B.—This finding in writing is all that we know about the matter. It may be imperfect, but it is all we know about it. Taking this, then, to be the statement of what the jury found, our judgment must be that the prisoner ought not to have been convicted.

PARKE, B.—They have found that he did not steal the watch, and that the story which he told in explanation of his keeping it was true.

PATTESON, J., CRESSWELL, J., and WILLIAMS, J. concurred.

Conviction quashed.

CROWN CASE RESERVED.

(Before POLLOCK, C. B., PARKE, B., PATTESON, J., CRESSWELL, J.,
and WILLIAMS, J.)

December 9, 1848.

REG. v. WEBB. (a)

Nuisance—Indecent exposure—Evidence—Practice.

An indictment for a nuisance at common law charged that the defendant, at, &c., in, &c. did expose and exhibit his private parts, naked and uncovered, in the presence of M. A., the wife of C., and of divers others of the liege subjects, &c. The evidence was, that the defendant took out and exposed his private parts to M. A., and thereupon she directly ran off and told her husband: that there was no one in sight but herself when she saw his private parts exposed. The defendant was convicted.

Held, that as the exposure to one person only was not an offence at common law, the words of "divers others of the liege subjects," &c. were material to be proved; and that as they had not been proved, the conviction ought to be quashed.

Semble, this court has authority, and is bound to examine the validity of an indictment, though no question is reserved thereon, and to quash the indictment if it is bad.

THE following case had been reserved by the assistant judge of the Middlesex Sessions.

James Webb was indicted at the Clerkenwell Sessions for an indecent exposure, on the following indictment:—

"Middlesex } The jurors for our lady the Queen, upon their
to wit. } oath, present that James Webb, late of the parish
of Saint Margaret, Westminster, in the county of Middlesex,
labourer, on the 2nd day of October, in the twelfth year of the
reign of our Sovereign Lady Victoria, by the grace of God, of the
United Kingdom of Great Britain and Ireland, Queen, Defender
of the Faith, with force and arms, at the parish aforesaid, in the
county aforesaid, in a certain public place, within a certain vic-
tualling alehouse there situate, unlawfully, wilfully, publicly, and
indecently did expose and exhibit his private parts, naked and
uncovered, in the presence of Mary Ann, the wife of Edward
Cherrill, and of divers others of the liege subjects of our Lady the
Queen, then and there being, for the space of divers, to wit, ten
minutes, to the great damage and common nuisance of the said
Mary Anne Cherrill, and the said other liege subjects of our said
lady the Queen, then and there being, to the great encouragement
of indecency and immorality, against the peace of our said lady
the Queen, her crown and dignity."

On the trial it was proved by the prosecutrix, that she was

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(a) Reported by A. BITTLESTON, Esq., Barrister-at Law.

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taking care of a public-house, and standing behind the bar, through which was the public passage from the entrance door of the public-house to the bar-parlour, that he conducted himself in an offensive manner, but not amounting to an indecent exposure, and whilst so doing several persons passed to and fro; that he then took out and exposed his private parts to her, and thereupon she directly ran off and told her husband. That there was no one in sight but herself at the time when she saw his private parts exposed.

Two points were made; *first*, that an indecent exposure in the bar of a public-house is not an indictable offence; *secondly*, assuming the place sufficient, that there must be more than one person present at the time of the exposure, or the offence is not complete. The jury, under my direction, found the prisoner guilty, subject to the opinion of the judges on the above points. The judgment is respited.

Clarkson, for the defendant.—*First*. The indictment is bad.

PARKE, B.—That is not reserved. You may bring your writ of error on that.

Clarkson.—Then, as to the evidence. This is an indictment for a nuisance at common law, and to sustain it, it must be shown that the exposure was in an open and public place, and publicly "to the people." The offence charged is one at common law, and differs from the analogous statutory act of vagrancy, which may be committed by exposure to a single female, with intent "to insult her." In 1 Hawk. P. C. c. 5, s. 4, amongst offences at common law is classed, "all open lewdness, grossly scandalous; such as was that of those persons who exposed themselves naked to the people in a balcony in Covent Garden, with most abominable circumstances;" referring to *Sir Charles Sedley's case* (Sid. 168; 1 Keb. 620). The offence is laid down in the same terms in *Burn's Justice* (Ed. Chitty), tit. "Lewdness;" and 1 East, P. C. c. 1, s. 1. In *Rex v. Crunden* (2 Camp. 89), it was held an indictable offence for a man to undress himself on the beach, and to bathe in the sea near inhabited houses, from which he might be distinctly seen, although those houses had been recently erected, and till then it had been usual for men to bathe there in great numbers. The publicity of the act was the ground of the decision. M'Donald, C. B., said, "It is no justification that bathing at this spot might a few years ago be innocent. For anything that I know, a man might a few years ago have harmlessly danced naked in the fields beyond Montague House; but it will scarcely be said by the learned counsel for the defendant, that any one might now do so with impunity in Russell Square. Whatever place becomes the habitation of civilized men, there the laws of decency must be enforced."

PARKE, B.—In a case tried by me at York in the year 1830, where it was shown that a French master had exhibited his private parts at the second floor window of a house in Micklegate, in order to attract the attention of a servant opposite, I left it to the jury to say whether the passers-by in the street could have seen him;

they found that they could. I directed a verdict of guilty to be entered, and sentenced him.

POLLOCK, C. B.—There must be the wicked intention; and that must be left to the jury; but it could hardly exist in the case of a man's exposing his person in solitary places. We think that under this act we may, and therefore are bound to look at the indictment; and, if it is bad, to arrest the judgment. In such a case as this it is desirable, if possible, to confine the question to matters of pleading.

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Clarkson.—The indictment does not state an offence, for the exposing and exhibiting charged are stated to have been committed "in the presence" of Mary Ann C., which is quite consistent with its not having been committed in her sight. The words "expose" and "exhibit" are not terms of art, and do not necessarily import an act done in the actual sight of a person. The case of *Reg. v. Watson* (2 Cox C. C. 376), shows that the exposing the private parts to one woman only is not at common law a crime punishable by indictment. Now, the phrase "conducting himself in an offensive manner," cannot be held to describe criminal conduct, however irritating or contemptuous the acts indicated by it may have been; yet the acts so described were all that took place in the presence of more than one person. The act that constituted the offence was in the presence of Mary Ann Cherrill only, and therefore, unless *Reg. v. Watson* be overruled, did not support the indictment, if the indictment is good.

Prendergast, contra.—The indictment is good. The defendant is charged with having committed the offence "in a certain place within a certain victualling alehouse there situate;" that is, in an inn to which the public has, of right, access; and with having done the act "unlawfully, wilfully, publicly, and indecently." These words, connected with the description of the act itself, import an offence. To "exhibit in the presence of" a person, obviously means to show to that person. Then as to the evidence, the case of *Reg. v. Watson* is distinguishable, because there the act was charged as an offence against the particular girl by its tendency to corrupt her morals, which did not constitute an indictable offence. In this case there was a clear invasion of the rights of the public; the fact that the woman was alone was a mere casualty that does not influence the prisoner; the place was public, others had been present, and might have been present.

POLLOCK, C. B.—She says that no one was in sight.

Prendergast.—Any one else, in any part of this public place, to which the public had right of access, might have seen what the prisoner did; so that the case is, in principle, similar to that tried in 1830 before Parke, B.

POLLOCK, C. B.—In *Sir Charles Sedley's case*, the indictment charges the exposure "within sight and view, which is open to the like criticism as the phrase "in the presence of."

PATTESON, J.—The indictment usually goes on to say, "did expose to the view of," &c. Why are these words left out?

POLLOCK, C. B.—I understand my brother Parke to have

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decided in the case at York, that the act was not criminal at common law unless the passers-by might have seen it.

PARKE, B.—That is so: I thought that if no one but the maid-servant could see what the prisoner did, he had not committed an indictable offence, but that if any one else could see what he did, an indictable offence had been committed.

POLLOCK, C. B.—It is consistent with this indictment that she did not see what the prisoner did; and it is quite consistent with the evidence that no one else could have seen what he did.

Prendergast.—The place in which this act was done shows it to amount to an indictable offence. If the crime had been the exhibiting an obscene picture, the exposing it near a public highway would have been sufficient.

POLLOCK, C. B.—It appears to me that a conviction ought not to have taken place. It is not necessary to decide whether the indictment can be sustained, or whether it is bad in arrest of judgment, though it is better to adhere to precedents than to make experiments with how little an indictable offence may be stated. I think that this case is governed by that of *Reg. v. Watson*. There, on proof that the act was done in the presence of but one person, the defendant was acquitted on the second count, and subsequently judgment was arrested on the first count, which stated the act to have been done in the presence of but one person. Now, in this case, the evidence shows that but one person was present when the act that would sustain an indictment was committed. Striking out then from the indictment all that relates to the other persons, which, as the evidence shows, ought not to have been in the indictment, the indictment would become one upon which, on the authority of *Reg. v. Watson* (a case in which I fully concur), we ought to arrest the judgment. The matter which distinguishes this indictment from *Reg. v. Watson* has not been proved: the evidence then is only sufficient to sustain such an indictment as that in *Reg. v. Watson*; and, therefore, a conviction not to have taken place.

PARKE, B.—I am of the same opinion. I think that the phrase “in the presence of” means “in sight of;” it is possible, however, that the indictment is bad. If, however, we strike out of it all that is not proved, it becomes that in *Reg. v. Watson*, and by that case we are bound.

PATTESON, J.—I am entirely of the same opinion, and on the same grounds. I adhere to the case of *Reg. v. Watson*. If that case is right, the words in this indictment stating the exposure and exhibition in the presence of, “divers others of the liege subjects,” &c. are material, but they are not proven. If we strike them out, the case is exactly similar to that of *Reg. v. Watson*. I wish to guard myself against its being supposed that I think this indictment good.

CRESSWELL, J.—I am of the same opinion as to the judgment to be pronounced. I should be sorry to say that this indictment was bad; but that is not the point before us.

WILLIAMS, J., concurred.

Conviction quashed.

CROWN CASE RESERVED.

(Before POLLOCK, C. B., PARKE, B., PATTESON, J., CRESSWELL, J., and
WILLIAMS, J.)

REG. v STEER.(a)

Contract of bailment—Determination of.

A. the bailee of B.'s mare, took her to a certain livery stable in the town of P. where B. was, paid to B. the balance of money due to him after deducting one pound due for the keep of the mare, and told B. that she was at the livery-stables. B. sent word to the stable-keeper not to let A. have the mare again; and on A. asking to be allowed to ride the mare to a certain place, twice told him never to put finger near her more, to which A. said, "Well." After B. had left the town, A. obtained the mare from the ostler at the livery-stables by a false story, and never returned her.

Held, that there was evidence to go to the jury that a change of possession of the mare had taken place after she had been left at the stables, and that the stable-keeper had become B.'s agent.

JOHAN DISTIN STEER was tried at the last Michaelmas Quarter Sessions for the borough of Plymouth, on an indictment, charging him with stealing a mare, the property of James Ingsley, and was by the jury found guilty. The judgment was respited, subject to the following case:—

"It appeared in evidence that the prosecutor, James Ingsley, who lived in Jersey, had in March, 1848, delivered a horse and the mare in question, to the keeping of the prisoner, who was a farmer and horse dealer living at Loddiswell, sixteen miles from Plymouth, with orders to do his best to sell them. Accordingly, in May, 1848, the prisoner sold the horse. On the 27th June, 1848, the prosecutor (who was himself examined as a witness), went to Loddiswell with Richard Gee, who was also examined as a witness, and stated to the prisoner that he came for the express purpose of taking the mare away, and that he wanted his bill.

The prisoner answered, that he had no bill to give him; that all was paid with the money he (the prisoner) had received from the prosecutor, and out of the money that he (the prisoner) had got from the sale of the horse; that he had sold the horse for seventeen sovereigns, and that after all was paid he had fourteen sovereigns to hand over to the prosecutor; he added, that the mare had received temporary injury from a fall; and it appearing on examination that such was the case, the prosecutor consented that she should remain with the prisoner a few days longer.

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(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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The next day (the 28th of June) the prosecutor, in consequence of some information received in the interval, went again, with his brother-in-law, Thomas Steer (who was also examined as a witness), to the house of the prisoner, who was at that time absent. Whereupon the prosecutor left Thomas Steer there, with orders, on the return of the prisoner, to demand the mare and the money.

Upon the prisoner's return on the 29th, Thomas Steer made the demand accordingly, when the prisoner refused to give up the mare or the money to him; but said that he would go and see the prosecutor himself at Plymouth; and thereupon the prisoner rode the mare, and Thomas Steer rode in company with him to Plymouth the same day.

At Plymouth the prisoner, in Thomas Steer's presence, placed the mare at Part's livery-stables, and they both then went to seek the prosecutor. On finding him, Thomas Steer stated, in the prisoner's presence, that he, the prisoner, had stated that he would not deliver to him the mare or the money, but that he would go himself to Plymouth. The prosecutor, upon this, told the prisoner that he need not have done so, as he, the prosecutor, had given full power in the matter to Thomas Steer the day before; Thomas Steer then said, the mare is at Part's. After this they dined together, and then the prisoner paid the prosecutor 13*l.* saying that he kept back 1*l.* for vetches had since the mare's illness, and that this was all that was due. The prosecutor then told Thomas Steer to take the mare and ride her to Mr. Eliot's at Babland, who was going to keep, and eventually buy her.

Case reserved.

Upon this the prisoner said, why not let me take the mare back to Eliot's myself, its all in my way; to which the prosecutor answered, I dare you ever to put a finger near that mare again; Thomas shall ride her to Mr. Eliot's, and you may ride Thomas's horse home if you please. The prisoner then left.

Just after this, the prosecutor sent his nephew George with orders; according to which George went to the stable at Part's, where the mare was, and ordered the ostler not to let the prisoner have the mare, as it was his uncle's.

The prosecutor, in the mean time, set out to go on board the steamer for Jersey. On his way to the quay the prisoner found him, and again twice asked to be allowed to take the mare to Mr. Eliot's himself, and again was twice ordered by the prosecutor, in the presence of Thomas Steer, who accompanied them, never to put finger near the mare more; to which he answered, "Well." The prisoner then said, "I am short," to which the prosecutor answered, "I won't see you short for a crown piece to go home with," and gave him five shillings. The prisoner then left.

Thomas Steer went on with the prosecutor, and saw him on board the steamer for Jersey.

In the mean while the prisoner, on leaving the prosecutor, met a man called Elmsley, who had been in company with the prisoner

and prosecutor, in the course of the afternoon. On so meeting Elmsley, he told him that the prosecutor and himself had made it all right, and that the prosecutor had given him five shillings. Elmsley, who was examined as a witness at the trial, then went with the prisoner about five o'clock A.M. to Part's stables. The ostler then told the prisoner that a boy had been there to say that he, the ostler, was not to give up the mare to him, the prisoner, for she was his uncle's. To this the prisoner answered, "I have just left the party, its all right now," and ordered out the mare; upon which the ostler brought out the mare, and gave her to the prisoner. The prisoner then paid for the mare's bait, and said, "If any one comes to inquire for me, say I am gone into the country a mile to see a pony, and I shall be back in an hour." Elmsley then said, "If I am to go to the town's end I will ride the mare." The prisoner then handed the mare to Elmsley, who mounted and rode her through the streets, the prisoner following close by her side. When they arrived at the Modbury Inn, on the outskirts of the town, Elmsley dismounted, and they stopped and drank. The prisoner then said, "I am off home," got up, and rode the mare away. The prisoner never returned to Part's, and neither the ostler nor Elmsley saw him again until he was in custody. On his road home to Loddiswell, on his being asked by Richard Gee aforesaid, whom he accidentally met, "How's this, that you have got the mare back?" the prisoner answered, "I have seen Mr. Ingsley, and settled to take her back again." Thomas Steer, after seeing the prisoner on board the steamer for Jersey, returned to Part's and found the mare gone. On further inquiry, he subsequently, on the 7th of July, went to the prisoner's house, and demanded the mare, when the prisoner owned that he had sold her. Upon which a warrant was applied for, and the prisoner apprehended.

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Bailment.

Case reserved.

It appeared further on evidence, that the prisoner's brother William had sold the mare, as early as the 3rd of July, to a Mr. Bickford, with the prisoner's assent, the prisoner stating to Mr. Bickford that he himself had previously sold the mare to his said brother.

During the whole of these proceedings, as it appeared in evidence, the prisoner never set up any claim of lien for the keep or maintenance of the mare, neither did he ever allege that he had any pecuniary demand of any sort against the prosecutor until he appeared in custody before the magistrates.

At the trial, no evidence was produced on the part of the prisoner for any such debt or demand.

At the close of the case for the prosecution it was contended for the prisoner, on the authority of *R. v. Smith* (1 Mood. Cr. Cas. 473), and *R. v. Bunks* (Russ. & Ryan, 441), that there was no case of felony to go to the jury.

I, however, was of opinion that the present case was distinguishable from the case cited, and that although there was clearly no felonious intention on the part of the prisoner at the time when

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he first got possession of the mare by virtue of the original bailment in March, still, as that bailment was determined before the prisoner took the mare away from Part's, that it was for the jury to say, regard being had to all the circumstances of the case, with what intention the prisoner so took the mare away on the 29th of June.

The jury having found the prisoner guilty, the judgment was respited, the prisoner being in the mean time liberated on recognizances.

The opinion of the judges, therefore, is now respectfully requested as to whether the prisoner was rightly convicted.

W. C. ROWE,

Dec. 1, 1848.

Recorder of Plymouth.

Greenwood, for the prisoner.—The conviction cannot be sustained. The possession was still in the prisoner when he took the horse away, and had not on that day been changed; the taking, therefore, may have been perverse, or, to the extent of the desire to obtain the commission for selling the mare, dishonest, but it was not felonious.

POLLOCK, C. B.—If any point of law has been submitted to us in this case, it is whether there was any evidence to go to the jury that there was a change of possession of the horse after it went to Part's. If that is the question, I say that there was evidence to go to the jury on that matter. I also think the conclusion right.

Case reserved.

PARKE, B.—If there had been any countermand of the bailment and a continuing possession afterwards, the conclusion would be different, because trover would in that case have been in the form of action, and, to sustain the indictment, trespass *de bonis asportatis* ought to be the form. The case also differs from those in which a determination of the bailment has been effected by breaking bulk, in which, again, trespass *de bonis asportatis* would be the form of action. I do not enter into what was done before the mare was put into Part's stables, and I suppose it to have been put there by the prisoner. It is quite clear that the bailment was subsequently determined by the prosecutor, with the full consent of the prisoner. The effect of that was to make Part's possession the same as if the mare had been originally bailed to Part by the prosecutor. That being so, the prisoner went with a false story and got the mare.

PATTESON, J.—The whole question is, whether Part had become the agent of the prosecutor. There can be no doubt that there was sufficient evidence of that.

CRESSWELL, J., and WILLIAMS, J., concurred.

Conviction confirmed.

WESTERN CIRCUIT.

WILTS SUMMER ASSIZES, 1848.

Devizes, August 14.

(Before Mr. Justice COLERIDGE.)

REG. v. PARGETER.

Manslaughter—Indictment—Averment of duty and neglect.

In an indictment for manslaughter by neglect to give a proper signal to denote the obstruction of a line of railway, whereby a collision took place and a passenger was killed,

1st: It was charged that the prisoner's duty was to attend to the proper working of the signals, according to the rules.

Held, that it was not necessary to set out the rules.

2nd: It appeared that the prisoner had many other duties, besides attending to the signal posts, some of them being incompatible with his duty there.

Held, that it was not necessary to set forth all the other duties and then to negative that the prisoner was employed at the time in the discharge of either of such other duties.

3rd: Held, that an averment that it was prisoner's duty to signal an obstruction, and that there was an obstruction which prisoner neglected to signal, was a sufficient description of the offence, and that it was not necessary to aver that the prisoner's duty was, if there was an obstruction and he saw it, to signal it, and that there was an obstruction which he might have seen but neglected to see.

4th: That it is sufficient to aver the duty to be to make "a proper signal," without further describing it.

5th: That a count which charged both a neglect to give the right signal, and the giving of the wrong signal, is not bad for duplicity.

6th: That it is sufficient to charge "that the prisoner did neglect and omit to alter the said signal," without stating more particularly what was the specific alteration which he so neglected to make.

SLADE and Cole for the prosecution.

Stone and E. W. Cox for the prisoner.

The indictment was as follows:—the first count was given in *extenso*, but only the material parts of the others.

"Wilts, to wit:—The jurors of our lady the Queen, upon their oath present that before and at the time of committing the felony hereinafter mentioned, George Pargeter, late of the parish of Shrivenham, in the county of Berks, labourer, on the 11th day of May, in the year of our Lord one thousand eight hundred and forty-eight, at the parish aforesaid, in the county of Berks aforesaid, was a servant and policeman in the service and employ of a certain company, to wit, the Great Western Railway Company, in and upon a certain railway, to wit, the G. W. R., and the jurors

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—*Indictment.*

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—Indictment.

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1st count.

aforesaid, upon their oath aforesaid, do further present that before and at the time of committing the said felony, certain signal-posts had been and were erected by the said company, near to certain stations upon the said railway, for the purpose of making signals for the regulation, guidance, and warning of the drivers of locomotive engines attached to and drawing the trains of carriages travelling upon and along the said railway, which said signals were sufficient and proper for the purposes aforesaid, and were, at the time of the committing of the said felony, in constant use and in full force and effect, and well known to the said G. P., to wit, at the parish aforesaid, in the county of Berks aforesaid; and the jurors aforesaid, upon their oath aforesaid, do further present that one of such signals, in such use and so used as aforesaid, and known to the said G. P. as aforesaid, when made, denoted and *was intended to denote and give warning and notice to the said drivers, that the line of the said railway, at the station near unto which the said signal was made, was then free from obstruction*, and that the driver of any engine attached to and drawing any train of carriages then approaching the said station might safely pass through the same, with the train, without stopping, and which *said signal was then and there called and known by the name of the 'all right' signal*, and that one other of such signals so used as aforesaid, and known to the said G. P. as aforesaid, when made, denoted and *was intended to denote and give warning and notice to the said drivers, that the line of the said railway near to which the said last-mentioned signal was made, was then obstructed*, and that the driver of any engine attached to and drawing any train of carriages then approaching the said station could not safely pass through the same, with the train, without stopping, and which *said last-mentioned signal was then and there called and known by the name of the signal 'to stop.'* And the jurors aforesaid, upon their oaths aforesaid, do further present that *certain rules and directions had been and were, at the time of the committing of the said felony, established for the guidance of the conduct of the servants and policemen of the said company employed in and upon the said railway, and having the care and regulation of the said signals, and which said rules and regulations were sufficient and proper for the purposes aforesaid, and were, at the time of committing the said felony, in full force and effect, and well known to the said G. P., to wit, at the parish aforesaid, in the said county of Berks; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said G. P. on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, in and upon one Arthur Augustus Lea, in the peace of God, and of our said lady the Queen, then and there being, feloniously did make an assault; and that the said G. P. so being such servant and policeman, in the service and employment of the said G. W. R. C. as aforesaid, then and there had, by virtue of such his employment, the care and regulation of the said signals, at a certain signal post erected and being near a certain station on the said line of the said railway, to wit, the Shrivenham station, and near the*

line of the said railway there, and that before and on the said 11th day of May in the year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, *it became, and was the duty of the said G. P. to attend to the due and proper righting, exhibiting, and making of the said signals, at the said last-mentioned station, and duly and properly to work, exhibit, and make the same, according to the rules and regulations there established for the guidance of the conduct of the servants and policemen of the said company, employed in and upon the said railway as aforesaid; and the jurors aforesaid, upon their oath aforesaid, do further present, that on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, a certain train of carriages drawn by a locomotive engine, under the care and guidance of a certain driver thereof, to wit, one Robert Roscoe, was travelling on the said railway, to wit, from Exeter to London, and was before and at the time of the committing of the felony by the said G. P. as hereinafter mentioned, due at the said Shrivenham station, to wit, at the hour of three of the clock in the afternoon of the said 11th day of May, and was expected and intended, according to the time table and regulations by the said company in that behalf established, to arrive and pass through the said Shrivenham station, at the time and hour last aforesaid, as he the said G. P. then and there well knew; and that the said G. P. had then and there, in expectation of the arrival of the said last-mentioned train of carriages, made and turned on the signal called the 'all right' signal; and the jurors aforesaid, upon their oath aforesaid, do further present that afterwards and before the arrival of the said last-mentioned train of carriages at the Shrivenham station, to wit, on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, a certain carriage, to wit, a horse box, was put, and placed, and continued, and was upon, and across, and obstructing the same line of rails of the said railway, near to the said Shrivenham station, as that on which the said last-mentioned train of carriages was then travelling; and it thereupon, then and there, and in consequence of such last-mentioned obstruction, became and was the duty of the said G. P. to alter, remove, and turn off the said signal called the 'all right' signal, and to make, turn on, and keep made and turned on, the said signal called the signal 'to stop;' and the jurors aforesaid, upon their oath aforesaid, do further present that the said G. P. then and there being wholly unmindful and neglectful of his duty in that behalf, at the time and place last aforesaid, on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, with force and arms, unlawfully and feloniously did neglect and omit to alter, remove, and turn off the said signal called the 'all right' signal, and did then and there unlawfully and feloniously neglect and omit to make, turn on, and keep made and turned on, the said signal called the signal 'to stop.'* By means of which several premises, and of the said felonious omissions and neglect by the said G. P. as aforesaid, the driver of the engine attached to the said last-mentioned train of carriages, to wit, the said R. R. was induced to believe, and did

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—
Manslaughter
—Indictment.

Indictment,
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—
Manslaughter
—*Indictment.*

Indictment,
1st count.

aforesaid, upon their oath aforesaid, do further present that before and at the time of committing the said felony, certain signal-posts had been and were erected by the said company, near to certain stations upon the said railway, for the purpose of making signals for the regulation, guidance, and warning of the drivers of locomotive engines attached to and drawing the trains of carriages travelling upon and along the said railway, which said signals were sufficient and proper for the purposes aforesaid, and were, at the time of the committing of the said felony, in constant use and in full force and effect, and well known to the said G. P., to wit, at the parish aforesaid, in the county of Berks aforesaid; and the jurors aforesaid, upon their oath aforesaid, do further present that one of such signals, in such use and so used as aforesaid, and known to the said G. P. as aforesaid, when made, denoted and *was intended to denote and give warning and notice to the said drivers, that the line of the said railway, at the station near unto which the said signal was made, was then free from obstruction*, and that the driver of any engine attached to and drawing any train of carriages then approaching the said station might safely pass through the same, with the train, without stopping, and which *said signal was then and there called and known by the name of the 'all right' signal*, and that one other of such signals so used as aforesaid, and known to the said G. P. as aforesaid, when made, denoted and *was intended to denote and give warning and notice to the said drivers, that the line of the said railway near to which the said last-mentioned signal was made, was then obstructed*, and that the driver of any engine attached to and drawing any train of carriages then approaching the said station could not safely pass through the same, with the train, without stopping, and which *said last-mentioned signal was then and there called and known by the name of the signal 'to stop.'* And the jurors aforesaid, upon their oaths aforesaid, do further present that *certain rules and directions had been and were, at the time of the committing of the said felony, established for the guidance of the conduct of the servants and policemen of the said company employed in and upon the said railway, and having the care and regulation of the said signals, and which said rules and regulations were sufficient and proper for the purposes aforesaid, and were, at the time of committing the said felony, in full force and effect, and well known to the said G. P., to wit, at the parish aforesaid, in the said county of Berks*; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said G. P. on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, in and upon one Arthur Augustus Lea, in the peace of God, and of our said lady the Queen, then and there being, feloniously did make an assault; and that the said G. P. so being such servant and policeman, in the service and employment of the said G. W. R. C. as aforesaid, then and there had, by virtue of such his employment, the care and regulation of the said signals, at a certain signal post erected and being near a certain station on the said line of the said railway, to wit, the Shrivenham station, and near the

line of the said railway there, and that before and on the said 11th day of May in the year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, *it became, and was the duty of the said G. P. to attend to the due and proper righting, exhibiting, and making of the said signals, at the said last-mentioned station, and duly and properly to work, exhibit, and make the same, according to the rules and regulations there established for the guidance of the conduct of the servants and policemen of the said company, employed in and upon the said railway as aforesaid; and the jurors aforesaid, upon their oath aforesaid, do further present, that on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, a certain train of carriages drawn by a locomotive engine, under the care and guidance of a certain driver thereof, to wit, one Robert Roscoe, was travelling on the said railway, to wit, from Exeter to London, and was before and at the time of the committing of the felony by the said G. P. as hereinafter mentioned, due at the said Shrivenham station, to wit, at the hour of three of the clock in the afternoon of the said 11th day of May, and was expected and intended, according to the time table and regulations by the said company in that behalf established, to arrive and pass through the said Shrivenham station, at the time and hour last aforesaid, as he the said G. P. then and there well knew; and that the said G. P. had then and there, in expectation of the arrival of the said last-mentioned train of carriages, made and turned on the signal called the 'all right' signal; and the jurors aforesaid, upon their oath aforesaid, do further present that afterwards and before the arrival of the said last-mentioned train of carriages at the Shrivenham station, to wit, on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, a certain carriage, to wit, a horse box, was put, and placed, and continued, and was upon, and across, and obstructing the same line of rails of the said railway, near to the said Shrivenham station, as that on which the said last-mentioned train of carriages was then travelling; and it thereupon, then and there, and in consequence of such last-mentioned obstruction, became and was the duty of the said G. P. to alter, remove, and turn off the said signal called the 'all right' signal, and to make, turn on, and keep made and turned on, the said signal called the signal 'to stop;' and the jurors aforesaid, upon their oath aforesaid, do further present that the said G. P. then and there being wholly unmindful and neglectful of his duty in that behalf, at the time and place last aforesaid, on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, with force and arms, unlawfully and feloniously did neglect and omit to alter, remove, and turn off the said signal called the 'all right' signal, and did then and there unlawfully and feloniously neglect and omit to make, turn on, and keep made and turned on, the said signal called the signal 'to stop.'* By means of which several premises, and of the said felonious omissions and neglect by the said G. P. as aforesaid, the driver of the engine attached to the said last-mentioned train of carriages, to wit, the said R. R. was induced to believe, and did

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—
Manslaughter
—Indictment.

Indictment,
1st count.

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Manslaughter
—*Indictment.*

Indictment,
1st count.

believe that the line of rails of the said railway, upon which the last-mentioned train of carriages was then travelling, was then all clear, and without obstruction, and that he the said driver, to wit, the said R. R., might then safely pass through the said Shrivenham station with the last-mentioned engine and train of carriages, without stopping, and the said driver, to wit, the said R. R. acting upon such belief as aforesaid, did, thereupon, on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, drive the said engine so attached to and drawing the last-mentioned train of carriages as aforesaid, through the said Shrivenham station, and in so drawing the said last-mentioned engine and train of carriages did then and there unavoidably and without any fault or default of the said R. R., with great force come into violent contact and collision with the said carriage called a horse box, then being on, upon, and across, and obstructing the same line of rails of the said railway as that on which the said last-mentioned train of carriages was then travelling, near to the said Shrivenham station there, by means of which said contact and collision caused and occasioned as aforesaid, the said A. A. L. then lawfully being and travelling in one of the carriages of the said last-mentioned train of carriages, was then and there violently and forcibly thrown on and against the back and sides of the said carriage in which he was so travelling as aforesaid, and was then and there violently and forcibly cast and thrown from and out of the said carriage in which he was so travelling as aforesaid, down to and upon the ground there, by means of which said casting and throwing of the said A. A. L., as well to and against the sides and back of the said carriage in which he was so travelling as aforesaid, as from and out of the said carriage, down to and upon the ground there as aforesaid, the said A. A. L. then and there had and received, and the said G. P. then and there feloniously did give and cause to be given to the said A. A. L. divers mortal wounds, bruises and contusions, in and upon the head, body, arms, and legs of him the said A. A. L., and divers mortal fractures of both the legs of him the said A. A. L., and divers mortal ruptures of the blood vessels in and upon the brain of the said A. A. L., of which said mortal wounds, bruises, and contusions, mortal fractures, and mortal ruptures of the said A. A. L., on and from the said 11th day of May, in the year aforesaid, as well at the parish of Shrivenham aforesaid, in the county of Berks aforesaid, as at the parish of Swindon, in the county of Wilts, did languish, and languishing did live, and there, to wit, on the day and year last aforesaid, at the parish of Swindon aforesaid, in the county of Wilts aforesaid, of the said mortal wounds, bruises, and contusions, mortal fractures, and mortal ruptures, did die, and so the jurors aforesaid, on their oaths aforesaid, do say that the said G. P. in manner and form aforesaid, the said A. A. L. at the parish of Swindon aforesaid, in the county of Wilts aforesaid, feloniously did kill and slay against the peace of our sovereign Queen, her crown and dignity.

2nd count.

The second count states that "it was the duty of the said

G. P. as such servant and policeman as aforesaid, to make certain signals to the drivers of locomotive engines attached to and drawing or propelling trains travelling upon and along the said railway, and passing along the same at a certain part thereof, to wit, near a certain station, to wit, the said Shrivenham station, to wit, at the parish of Shrivenham aforesaid, in the county of Berks aforesaid, for the purpose of giving warning and notice to the said drivers, whether the line of rails of the said railway on and upon which any such locomotive engine and train of carriages as aforesaid should or might be passing at, near, and through the said Shrivenham station, was free of obstruction or not, of all which the said G. P. at the time of the committing of the said felony had full knowledge and notice, to wit, at the day and year last aforesaid, at the parish last aforesaid, in the county of Berks aforesaid." It then proceeds to aver that a train was travelling on the line, "on and along the part of the said railway which lies in the said parish, &c., and up to, and towards the place where it was the duty of the said G. P. to make such signal as aforesaid," and that just before the time of its arrival at the said place "there was a certain obstruction on and upon the same line of rails as that upon which the said last-mentioned locomotive engine and train was travelling, to wit, a certain horse box, standing and being upon and across the said last-mentioned line of rails, near to the place where it was the duty of the said G. P. to make such signals as last aforesaid, to wit, at the parish last aforesaid, in the county of Berks; and the said G. P. could, and might, and ought, then and there, to wit, at the parish last aforesaid, in the county of Berks, on the said 11th day of May, in the year aforesaid, in the course of his duty, and in the exercise of reasonable and proper skill and diligence, to have given warning and notice by means of the proper signal to the driver of the said last-mentioned locomotive engine attached to and drawing the last-mentioned train of carriages, to wit, the said R. R. that there was then such obstruction as last aforesaid in and upon the said line of rails, to wit, the said horse box. And the jurors, &c. do further present that the said G. P. then and there being wholly unmindful and neglectful of his duty in that behalf, on, &c. in the parish, &c., with force and arms, unlawfully and feloniously did neglect and omit to give notice and warning, by means of the proper signal, to the driver of the last-mentioned locomotive engine attached to and drawing the said last-mentioned train of carriages, to wit, the said R. R. that then there was an obstruction upon the same line of rails as that on which the said-mentioned train of carriages was then travelling, by means of which," &c.

The third count states the averment of the signals, and of the prisoner's duty, thus:—Reciting, that the said G. P. was in the employ, &c. as a policeman, and that "for the safe and proper working and travelling of the several trains of carriages and locomotive engines proceeding along and upon the said railway, certain signals had been and were at the time of the committing of the offence by the said G. P., as hereinafter mentioned, established by

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—
Manslaughter
—Indictment.

Indictment,
2nd count.

3rd count.

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v.
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—
Manslaughter
—*Indictment.*

Indictment.

4th count.

Facts.

the said company at and near a certain station upon the said railway, and at and near the said station, to wit, the Shrivenham station, at which the said G. P. was employed as aforesaid, and were well known to the said G. P., to wit, at the parish last aforesaid, in the county of Berks aforesaid. And the jurors, &c. do further present, that on the said, &c., in the parish, &c., the said G. P. had the care and control of the said signals, at the said station, to wit, the Shrivenham station, at which the said G. P. was so employed as servant or policeman as aforesaid, and it *then and there became and was the duty of the said G. P. by virtue of such his employment as aforesaid, from time to time, and at all times, as occasion might require, to make due and proper signals* to the drivers of all locomotive engines travelling along and upon the said railway, and entering the said station, to wit, the Shrivenham station." The count then proceeds to set forth, that a train was travelling on the said line of railway, that a horse box had been placed upon and across it so as to obstruct the passage of the train, "*and that it thereupon then and there became the duty of the said G. P. to indicate by proper signals to the driver of the said last-mentioned train of carriages so due and about to enter and pass through the said last-mentioned station as aforesaid, that the line of rails of the said railway upon which the said last-mentioned train of carriages were then travelling, was there obstructed.* And the jurors, &c. do further present that the said G. P. afterwards, to wit, on the day, &c., at the parish, &c. *wholly neglecting his duty in that behalf, with force and arms, unlawfully and feloniously did neglect and omit to indicate by proper signals to the driver of the said last-mentioned train of carriages so travelling upon the said railway as aforesaid, and so due, and about to enter and pass through the said last-mentioned station as aforesaid that the line of rails of the said railway upon which the said last-mentioned train of carriages was then travelling was then obstructed, but on the contrary thereof, the said G. P. then and there unlawfully and feloniously did indicate by signals to the driver of the said last-mentioned train of carriages, that the line of rails of the said railway on which the said last-mentioned train of carriages was then travelling, at or near the said last-mentioned station, was then all clear and free from obstruction, by means of which several premises and the said felonious omissions and neglects of the said G. P."* &c. &c.

The fourth count was a common count for manslaughter, by assaulting, beating, and bruising, &c.

The facts were these:—The prisoner was a policeman on the Great Western Railway, at the Shrivenham station. At the station there are two signal posts, one for the up and the other for the down line, about eighty yards apart; and one being on one side of the line and the other on the other side. The duty of the prisoner was proved to be, to attend to both of these signal posts when a train was due; when the line was clear to turn on what is called the "all right" signal; and when the line was obstructed to turn on the danger signal. It appeared also that the

prisoner had other duties besides these. He had to close a gate across a road that crossed the line near the down signal post, and generally to assist and act as a policeman.

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PARGETER.

On the day in question (the 11th of May, 1848) the up-express train was over due by half an hour, and a down train having just arrived, the prisoner was at his post at the down signal and the road gate. As soon as the down train had started, he hastened across the road to the up-signal post for the purpose of waiting and signalling the up-express train, then half an hour behind its time. Just then two of the porters, believing that the express train had passed, moved a horse box and truck from a siding upon the line, which thereby became obstructed. Almost immediately the express train came up, a collision took place, and several persons were killed.

Manslaughter
—*Indictment.*

The prisoner had not turned on the danger signal, as it was his duty to do upon seeing the line obstructed; but the "all right" signal was up, and therefore the engineer drove through. It was proved that prisoner might have seen the obstruction had he looked up the line, and that there was time to have changed the signal. It was upon these facts that he was indicted for the manslaughter of one of the passengers killed by the collision thus occasioned.

Stone (*E. W. Cox* with him) submitted that the evidence did not sustain the indictment. The indictment charges that it was the prisoner's duty to attend to the signal post and give certain signals. But the evidence is that he had a series of duties to perform, as to watch two signal posts and to close a gate, besides other things; and as the very gist of the offence is the neglect of duty, where it appears upon the evidence that the prisoner had more duties than one, the performance of which might have been incompatible (as if both the trains had come in at the same time, and he was required to give both signals) the allegation in the indictment that it was his duty to attend to this particular signal is not proved in point of fact, for the evidence is that his duty was not *that*, but it was to move this signal, provided he was not engaged in the performance of one of his other duties in another part of the line. He submitted that so material a portion of the indictment as this, which was in fact the offence, should be proved as laid, and not being so proved, his lordship should direct an acquittal. It was the same as if the cause of death, in a charge of murder, had been proved to be different from that laid; as if it had been charged as by poison, and the evidence showed it to have been by a blow; in such case an acquittal would be directed; so here the manslaughter is charged to have been committed by a neglect, by this prisoner, of his duty to put up a certain signal; whereas the evidence is, that his duty was not to put up that signal, at all events, but only under certain circumstances, that is to say, when he was not engaged in the performance of some other of his numerous duties.

COLERIDGE, J.—The indictment alleges that his duty was to give the necessary signal of an obstruction, and although he had

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other duties, the evidence shows that at this time he was in the actual discharge of that particular duty; for he was at the post and gave the wrong signal, and it will be for the jury to say whether he was guilty of gross negligence in so doing.

His lordship having summed up, the jury returned a verdict of *guilty*.

Motion in arrest
of judgment.

E. W. Cox now (*Stone* having been called from the court) moved in arrest of judgment.—The indictment was bad for many reasons. Every count was defective. It was necessary to charge the offence distinctly; and with much more particularity where the mischief is the accidental and not the necessary result of the criminal act; that is to say, where the act is criminal, not *per se*, but by reason of its consequences. The crime *intended* to be charged here is that “it being the prisoner’s duty to *observe the line and perceive obstructions, and if he saw an obstruction* to give notice thereof by means of a certain signal, called the danger signal (describing it), he neglected his duty and did not look upon the line and perceive a certain obstruction then being there, and did not give notice thereof by such signal, whereby,” &c. He submitted confidently that it was not enough to aver generally that it was the prisoner’s duty to give a certain signal, but that the precise *nature of the duty and of the signal* should be averred, and also that the *nature of the neglect* should be stated, so that the prisoner may know precisely what is the neglect that constituted his crime; and that if a subsequent indictment were preferred for having occasioned the death by neglect, he might be enabled, by reference to this record, to plead *autrefois convict*, or *autrefois acquit*, as the case might be. He submitted that in no count did this indictment answer to these requisitions.

The first count alleges the duty thus: “It became and was the duty of the said G. P. to attend to the due and proper working, exhibiting, and making of the said signals at the said last-mentioned station, and duly and properly to work, exhibit, and make the same according to the rules and regulations then established for the guidance of the conduct of the servants and policemen of the said company employed in and upon the said railway as aforesaid.” And the breach of that duty is thus alleged, that “before the arrival of the said last-mentioned train of carriages at the said Shrivenham station, to wit, &c., a certain carriage, to wit, a horse box, was put, and placed, and continued, and was upon, and across, and obstructing the same line of rails of the said railway, near to the said Shrivenham station, as that on which the said last-mentioned train of carriages was then travelling, and it thereupon, then and there and in consequence of such last-mentioned obstruction became and was the duty of the said G. P. to alter, remove, and turn off the said signal called the ‘all right’ signal, and to make, turn on, and keep made and turned on the said signal called the signal ‘to stop,’ but that the said G. P. being then and there unmindful and neglectful of his duty in that behalf, at the time and place, &c., did neglect and omit to alter, remove, turn on,

and keep made and turned on the said signal called the signal 'to stop,' by means," &c.

This count is defective in many respects; first, it alleges the prisoner's duty to be "to attend to the due and proper working, &c., according to the rules. He submitted that the rules ought to have been set out, that it might appear upon the record by neglect of what particular rule it was that the death was caused. The necessity for this, to inform the prisoner of the particular offence with which he is charged, is manifest from the fact established by the production of the rules in evidence, which show that the duty was not as here alleged, namely, to attend to the due and proper working, &c., but that he had numerous other duties to perform: therefore he submitted, secondly, that the indictment should have stated all his duties, and then proceeded to negative his occupation at the time in the performance of each of the other duties; and for this reason, that this became a duty only when he was not engaged in the discharge of one of the other duties imposed upon him. It was not his absolute duty under any circumstances to give the signal. If, for instance, both up and down trains had been passing at the same time, as they did in fact pass within five minutes of each other in consequence of the lateness of the express train, it is quite certain the prisoner could not have been at *both* signal-posts; would, then, his absence from the other be a breach of duty? Or, if a collision had occurred with both trains, and in both there had been a death, and he had been indicted for manslaughter in both, it is clear that he could not be guilty by reason of neglect of duty in both, yet, upon this indictment and evidence, *mutatis mutandis*, he might have been convicted of both. Nothing could show more forcibly the defectiveness of this indictment in not setting out all his duties, and alleging that at the time he was not in the discharge of either of the other duties which are incompatible with the discharge of this one. Thirdly: the duty and the neglect are not stated with sufficient precision, in this respect, that it avers generally that there was an obstruction, and in consequence of such obstruction it was the prisoner's duty to give a certain signal. This was not and could not be his duty. His duty was, *if he saw an obstruction to give notice of it*. The duty could not be to signal, whether he saw it or not, whether in a dark night or in a fog, or whether he was there or on duty elsewhere; but only, if he saw an obstruction, to signal it. The indictment as it stands is quite consistent with innocence (and that is one great test of its insufficiency), for if it had occurred in a dark night, when vision was impossible, it could not be said that he was guilty of a breach of duty in not giving the signal. The *real* criminal neglect intended to be charged here, and that which alone would constitute it, was that *it was his duty to look upon the line and see if there was any obstruction there, and upon seeing an obstruction to give the signal*; and the criminal neglect should have been charged, as it was in fact, that he was at the time at the signal post, and that he did not look upon the line and see the obstruction and give the signal; and in another count

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Manslaughter
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Motion in arrest
of judgment.

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—
Manslaughter
—*Indictment.*

it might have been laid that the line was obstructed and that he might have seen the obstruction, but that he neglected to do so and to give the signal, &c. It was, therefore, confidently submitted that in this respect also the duty and the neglect which constituted the offence were both incorrectly and insufficiently stated. These objections apply to all the counts.

The third count is likewise bad for duplicity. It charged the prisoner *both* with neglect to make the right signal, *and* with making the wrong signal; these are *two* offences, one of omission and the other of commission, and should not have been joined.

The second count is bad also in that it alleges the duty to have been to give notice of the obstruction by means of *the proper signal*. It should have been stated what that proper signal was, what it was his duty to do in respect of it, and then that he did not do it. And so with the third count.

The 2nd count in like manner alleges the duty to be "to make due and proper signals," without describing them, and is bad for the same reason.

Lastly (and this objection applies to all the counts), the neglect requires to be as specifically stated as the duty. It is not enough to charge that the prisoner "did not perform his duty;" but it must be stated explicitly in what particular it was that the breach of duty (which is the offence) consisted. The 1st count charges merely that the prisoner "did neglect and omit to alter the said signal." The 2nd, the like, and the 3rd, that he did neglect and omit to indicate by proper signals, &c.; but on the contrary did indicate, &c. (He cited *Reg. v. Pelham*, 2 Cox's Crim. Cas. 17.)

Motion in arrest
of judgment.

Cole (*Slade* having been called out of court), contended that every count was good, and that none of the objections were tenable. It was alleged that the prisoner's duty was to give notice of an obstruction, if there was any, by a certain signal, which is described. The jury have found by their verdict that the prisoner was guilty of neglect in this, that there was an obstruction, and that the prisoner could have seen it, and could have given the proper signal. He was then stopped by the court.

COLERIDGE, J.—I am of opinion that none of the objections made to this indictment can be sustained. All that it is requisite to charge is so much as is necessary to constitute a crime. The crime intended to be here charged is manslaughter committed by means of a criminal neglect of duty in omitting to give notice by a certain signal that the line of rails was obstructed. This is done here by a series of averments,—that the prisoner was a servant of the company,—that certain signals were erected,—that certain rules were in force for the regulation of the signals, of which rules the prisoner had notice, and which it was his duty to observe: that, according to these rules, it was his duty to give notice by means of the signal when the line was obstructed; that on the day in question the line was obstructed, and that the prisoner neglected to give the signal proper in such a case, by means of which neglect the accident occurred. The jury have found the truth of these aver-

ments, and that the prisoner was guilty of neglect, and a defect (if any) in the description of the neglect is cured by the verdict. As to the most important of the objections, that it could not have been the duty of the prisoner under all the circumstances to make the signal, as in the night, or in the fog; the answer will be, that in this case the charge is that he *did* neglect to do so, and the jury have so found. In such circumstances as those suggested, there would be no neglect. The objections fail in arrest of judgment.

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PARGETER.
—
Manslaughter
—Indictment.

Sentence, three months' imprisonment.

Browne (of Swindon) attorney for the prosecution.

Hooper (of Exeter) attorney for the prisoner.

NORTHERN CIRCUIT.

YORK SUMMER ASSIZES, 1848.

(Before Mr. BARON PLATT.) (a)

REG. v. BATES and PUGH.

False pretences—Existing fact—Future conduct.

Where an indictment charges a false pretence of an existing fact calculated to induce the confidence which led to the prosecutor's parting with his property, though mixed up with false pretences as to the prisoner's future conduct, it is sufficient.

Where the false pretence is as to the status of the party at the time, or as to any collateral fact supposed to be then existing, it will equally support an indictment under the statute.

THE prisoners, Eli Bates and Jane Pugh, were indicted for obtaining goods by false pretences, and also for a conspiracy to defraud. The male prisoner was found guilty of the charge of obtaining goods by false pretences, and acquitted of the conspiracy.

REG.
v.
BATES
AND
PUGH.
—
False pretences

The indictment contained three counts, in substance the same, setting out the false pretences, the first of which set out all the pretences, the others varied the charge.

Price, for the prisoner, moved in arrest of judgment on the ground that the counts setting out the false pretences were bad.

The first count of the indictment stated "that Eli Bates, late of the parish of Huddersfield, in the county of York, labourer, and Jane Pugh, late of the same place, single woman, on the 15th day of September, A.D. 1848, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly did falsely pretend to one Henry Scholey, which said

(a) Reported by T. CAMPBELL FOSTER, Esq., Barrister-at-Law.

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—Indictment.

it might have been laid that the line was obstructed and that he might have seen the obstruction, but that he neglected to do so and to give the signal, &c. It was, therefore, confidently submitted that in this respect also the duty and the neglect which constituted the offence were both incorrectly and insufficiently stated. These objections apply to all the counts.

The third count is likewise bad for duplicity. It charged the prisoner *both* with neglect to make the right signal, *and* with making the wrong signal; these are *two* offences, one of omission and the other of commission, and should not have been joined.

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Henry Scholey was then and there the shopman of one Marmaduke Archer, in a certain shop of the said Marmaduke Archer, then and there kept by the said Marmaduke Archer, that he the said Eli Bates was then and there intending to open a shop in Manchester-street, in the town of Huddersfield, in the parish aforesaid, for the sale of certain articles, to wit, cheese and bacon, there by him the said Eli Bates, and that he the said Eli Bates was then and there a provision dealer, and that he the said Eli Bates was then possessed of a certain sum of money, to wit, the sum of 1*l.* 7*s.* 1½*d.*, and that he the said Eli Bates was then desirous of purchasing a certain cheese of the said Marmaduke Archer, in good faith, for the purpose of selling it again in the trade and business of a provision dealer, and that he the said Eli Bates had then the means of paying to the said Marmaduke Archer the price of the said cheese, to wit, the sum of 1*l.* 7*s.* 1½*d.*; and that if he the said Henry Scholey, for the said Marmaduke Archer, would then and there sell and deliver the said cheese to the said Eli Bates, he the said Eli Bates was then willing and ready to purchase the said cheese of him the said Marmaduke Archer, and then to pay to the said Henry Scholey the said sum of 1*l.* 7*s.* 1½*d.* by means of which said several false pretences they the said Eli Bates and Jane Pugh did then and there unlawfully obtain from the said Henry Scholey 46½*lbs.* of cheese of the value of 1*l.* 7*s.* 1½*d.* being then and there the cheese aforesaid of the goods and chattels of the said Marmaduke Archer, with intent then and there to cheat and defraud him the said Marmaduke Archer of the same. Whereas, in truth and in fact," &c., negating each false pretence set out.

In this count, all the pretences were so mixed up one with another, and depended so much the one upon the other, that if any one of them was bad and there was a general verdict of guilty, no judgment could be given upon this count: (*Reg. v. Wickham*, 10 Ad. & El. 34; 2 Russ. 310.) If the pretences were taken separately, the first pretence, that the prisoner "intended to open a shop in Manchester-street, Huddersfield," was not a pretence within the statute 7 & 8 Geo. 4, c. 29, s. 53, and was nothing more than a pretence of something passing in the man's mind, which could only be likened to the case of a promise as to his future conduct, and was distinguishable from the case of the under graduate: (*Rex v. Barnard*, 7 C. & P. 784.) If it were a pretence, then there ought to have been some allegation in the indictment to connect that pretence sufficiently with the transfer of the property: (*Rex v. Reid*, 7 C. & P. 848.) Then, the next pretence that "the said Eli Bates was then possessed of a certain sum of money, to wit, the sum of 1*l.* 7*s.* 1½*d.*" did not necessarily import that he had the money there in his pocket; and the averment that he had the means of paying for the said cheese came within the rules laid down in *Rex v. Reid* (*ut supra*), and was a mere false affirmation. The next pretence set out, that he was desirous of purchasing a cheese to sell again, was nothing more than a promise for future

conduct; and to say that a man was desirous of doing a thing was not a pretence of an existing fact: (*Reg. v. Johnston*, 2 M. C. C. 254.) Then the pretence that the man was ready and willing to pay was nothing more than a promise to pay on delivery (*Rex v. Codrington*, 1 C. & P. 661), the breach of which was a ground only of civil action.

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Ingham, J. T., for the prosecution, relied on the words of the statute and on *R. v. Crossley* (2 M. & R. 17). The cases of *R. v. Codrington* and *R. v. Johnston* were such that a civil remedy was applicable; the facts in those cases merely proved a breach of promise or of covenant; besides, the former was shaken by the observations of Patteson, J., in *R. v. Crossley*, and of Parke, B., in *R. v. Kendrick* (5 Q. B.) The pretence that prisoner intended to open a shop was a pretence of an existing fact calculated to induce a credit to be given, and equivalent to a pretence that he was a man of substance; it was descriptive of the *status* and position of the prisoner. *R. v. Johnston* was distinguishable because the pretence there stated, of an intention to marry the person from whom the money was obtained, was not calculated to induce credit as to the solvency of the prisoner, but rather amounted to a promise—a mere inducement to be executed if the money was furnished; if he had said he was going to marry an heiress the case would have been like the present. The report of *R. v. Reid* was not intelligible. Then as to the pretence that the prisoner was possessed of a certain sum of money, to wit, &c.; that is a statement as to an existing collateral fact, and steers clear of all the authorities cited by Mr. Price. It is also distinct from and unconnected with all the other pretences alleged, so as not to fall within the principle of *R. v. Wickham* (10 Ad. & E. 34). After verdict that pretence being good in itself, and distinct from all the others charged, would support the indictment. The pretences that he had the means of paying, and that he was ready and willing to pay, &c., were no doubt connected with the pretence of intending to open a shop, and therefore would not be sufficient if that were bad; but taken *per se* they were good false pretences. No one could doubt that an averment of a person's being ready and willing to pay, &c., in a declaration or plea, would be disproved by showing that a man was in insolvent circumstances, and in an indictment it must receive the same construction.

Price, in reply, relied on *R. v. Wickham* and *R. v. Reid*.

PLATT, B., delivering judgment, said, the indictment charged Judgment.
certain false pretences, that the prisoner was then intending to open a shop, &c.; and that he was a provision dealer, and was possessed of a certain sum of money, to wit, &c., and had then the means of paying, &c. It was objected, on behalf of the prisoner, that the pretences resolved themselves into a mere intention to do a future act. If all the pretences together were of that import, then the objection ought to prevail. If the intention to open a shop related simply to futurity, that would not do. But the pre-

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tence alleged that the prisoner "was then a provision dealer," and that was a pretence of an existing fact; so also was the pretence that the prisoner had then the means of paying, and was ready and willing to pay. In *R. v. Johnston* (2 M. C. C. 254), the substance of the pretence was, "If you will give me the money, I will apply it in a particular way,"—a mere promise, the breach of which was remediable by a civil remedy. If that were a false pretence within the statute, all breaches of contract would expose a man to an indictment. In *R. v. Reid* (7 C. & P.), no reason was assigned for the judgment; but the indictment showed no connexion between the coals and the weights, and the obtaining of the sovereign was not shown to have any connexion with the pretence. In *R. v. Wickham* (10 Ad. & El. 34), the substantial objection was that there was no sufficient averment that the promissory note therein mentioned was a valueless security; and it was quite apparent that the prisoner's statement that he was a captain would not have gained the credit. The other part of the pretence, therefore, was necessarily connected with it, and was bad *per se*. As to *R. v. Codrington* (*ubi supra*), he doubted the accuracy of that decision. It was impossible to say that the covenant was a false pretence; but the previous statement of the prisoner (though afterwards reduced into a contract) was, in his opinion, sufficient to support the indictment. *R. v. Kendrick* (5 Q. B.) accorded with this view, and conflicted directly with *R. v. Codrington*. In *R. v. Crossley* (2 M. & R. 17), the *corpus* of the representation was that the prisoner was possessed of 2,000*l.* odd, and he falsely represented his condition and *status* at the time. That case was exactly in point with the present; for the representations in the present indictment amounted to a statement to the following effect:—"I am a provision dealer; I am possessed of a certain sum of money; I am ready and willing to pay,"—all which representations were false. Ready and willing, in pleading a tender, meant that the man had the will and the ability to pay. The words had the same meaning here. He thought there was a false representation of particular facts which was calculated to induce the confidence which led to the prosecutor's parting with his property. And whether the false pretence were as to the *status* of the party at the time, or as to any collateral fact supposed to be then existing, it would equally support an indictment under the statute.

Guilty.

EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

November 14, 1848.

RICHARD DUNK v. THE QUEEN.(a)

Perjury—Affidavit of debt under 1 & 2 Vict. c. 110, s. 8—Authority of Registrar of Court of Bankruptcy to administer the oath—5 & 6 Vict. c. 122, ss. 11, 13, 67—Sentence—Security to keep the peace.

An indictment for perjury charged that the perjury was committed in an affidavit of debt filed in the Court of Bankruptcy, for the purpose of causing A. B. to be adjudged bankrupt, and sworn in the Court of Bankruptcy before a registrar thereof.

Held, 1, that the 8th sect. of 1 & 2 Vict. c. 110, under which the affidavit was sworn, is not repealed by the 11th sect. of 5 & 6 Vict. c. 122; and that therefore the false statements therein were material to a judicial inquiry.

2. That the affidavit was made in a matter relating to bankrupts; and therefore properly sworn before the registrar by virtue of sect. 67 of 5 & 6 Vict. c. 122.

The affidavit, as set out in the indictment, stated that A. B. C. was indebted; but "A. B. C." was explained by an inuendo to mean "the said A. G. B. C." mentioned in the inducement; and the negative allegation was, "Whereas in truth and in fact the said A. G. B. C. was not indebted."

Held, that the falsehood of the statement was sufficiently averred.

The judge, before whom the indictment was tried, passed sentence at nisi prius, and ordered the defendant to be imprisoned for eighteen months, and to give security to keep the peace and be of good behaviour for two years, to commence from the expiration of the eighteen months, and to be further imprisoned until such security should be given.

Held, that the judge had authority to pass that sentence.

Within six days after the commencement of the term following the trial, the Court of Queen's Bench granted a rule in arrest of judgment, which was afterwards discharged; but this rule did not appear upon the transcript of the record transmitted to this Court; and this Court therefore refused to take any notice of it, or to grant a rule that it should be annexed to or endorsed upon the record.

ERROR from a judgment of the Queen's Bench, upon an indictment for perjury.

The 6th count of the indictment was as follows:—

And the jurors aforesaid upon their oaths aforesaid do further present that at the time of the committing of the offence herein-after mentioned, the said Angela Georgina Burdett Coutts was a trader within the meaning of the statutes then in force concerning

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bankrupts, and that the said Richard Dunn being such evil disposed person as aforesaid, and wickedly and maliciously devising and intending unlawfully to annoy, harass, and grieve, and oppress the said Angela Georgina Burdett Coutts, and to put her, without any just cause, to great expense of her moneys, and falsely and maliciously to cause and procure her to be declared and adjudged bankrupt, on the said 31st day of March, in the year of our Lord 1846, at London aforesaid, in the parish and ward aforesaid, and within the jurisdiction of the Central Criminal Court, came in his own proper person into the Court of Bankruptcy (the same court then and still being held in Basinghall-street in the city of London aforesaid), and then and there appeared in his own proper person before one John Fisher Miller there, and then being one of the registrars of the said last-mentioned court, and was then and there duly sworn, and took his corporal oath upon the Holy Gospel of God, before the said John Fisher Miller, the said John Fisher Miller having then and there lawful and competent power and authority to administer the said oath to the said Richard Dunn, and that the said Richard Dunn being so sworn as last aforesaid, not having the fear of God before his eyes; but being moved and seduced by the instigation of the devil, then and there upon his oath aforesaid, falsely, maliciously, wickedly, wilfully, and corruptly did say, depose, swear, and make affidavit in writing in substance and to the effect following; that is to say, that Angela Burdett Coutts (meaning the said Angela Georgina Burdett Coutts), at the time of the making of the said affidavit, was justly and truly indebted unto him, the said Richard Dunn, in the sum of 100,000*l.* by virtue of a certain bill, &c.

Which said affidavit the said Richard Dunn then and there filed in the said Court of Bankruptcy, to wit, on the day and year last aforesaid, at London, in the parish and ward aforesaid, and within the jurisdiction of the Central Criminal Court, as by the said affidavit still affiled in the said Court of Bankruptcy in Basinghall-street aforesaid, in London aforesaid (amongst other things) more fully appears, whereas in truth and in fact the said Angela Georgina Burdett Coutts was not at the time of the making of the affidavit aforesaid, or at any other time, indebted to the said Richard Dunn in the sum of 100,000*l.* or in any other sum, &c.

All which he the said Richard Dunn, at the time of the making of the said affidavit, well knew, to wit, at London aforesaid, in the parish and ward aforesaid, and within the jurisdiction of the Central Criminal Court. And so the jurors aforesaid upon their oaths aforesaid do say that the said Richard Dunn, on the said 31st day of March, in the year of our Lord 1846 aforesaid, at London aforesaid, in the parish and ward aforesaid, and within the jurisdiction of the Central Criminal Court, upon his oath aforesaid, taken in the said Court of Bankruptcy, before the said John Fisher Miller, so being one of the registrars of the said last-mentioned court, the said John Fisher Miller then and there having lawful and competent power and authority to administer such last-mentioned oath

to the said Richard Dunn in that behalf, falsely, maliciously, wilfully, and corruptly, in manner and form aforesaid, did commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the great damage of the said Angela Georgina Burdett Coutts, and against the peace of our said lady the Queen, her crown and dignity.

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The postea was as follows :—

Afterwards and on the day and at the place last within mentioned before the Rt. Hon. Thomas Lord Denman, Chief Justice of our lady the Queen, assigned to hold pleas before the Queen herself, and the Hon. Thomas Denman being associated to the said Chief Justice according to the form of the statute in such case made and provided, come as well the within-named Charles Francis Robinson, Esquire, who for our said lady the Queen in this behalf prosecuteth, as the within-named Richard Dunn in his own proper person, and the jurors of the jury within mentioned being called, to wit, &c. (naming them), come and are sworn upon the said jury, &c.; whereupon the court here proceedeth to the taking of the inquest aforesaid by the jurors aforesaid now here appearing for the purpose aforesaid, who being sworn to speak the truth touching and concerning the matters within contained, say upon their oath, that the said Richard Dunn is guilty of the premises in the 6th count of the indictment within specified and charged upon him in manner and form as in and by the said 6th count of the said indictment is within alleged against him, and the jurors aforesaid now here appearing and sworn as aforesaid upon their oath aforesaid do further say that the said Richard Dunn is not guilty of the premises in the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th, and 10th counts of the indictment within specified and charged upon him in manner and form as the said Richard Dunn hath by pleading for himself within alleged.

And hereupon at the same sittings of *nisi prius* the said Thomas Lord Denman, Chief Justice within named, proceedeth to pronounce judgment; and thereupon all and singular the premises being seen and fully understood by the court here, it is considered, adjudged, and ordered by the said Chief Justice, that for the offence specified in the 6th count of the within-mentioned indictment, whereof the within-named defendant, Richard Dunn, is convicted, the said Richard Dunn be imprisoned in the Queen's prison for the space of eighteen calendar months, to commence and be computed from the day on which he shall be first taken to and confined in the said prison in execution of this sentence. And that he, the said Richard Dunn, do give security to keep the peace, and be of good behaviour towards Her Majesty and all her liege subjects, and especially towards Angela Georgina Burdett Coutts within mentioned, for the space of two years, to commence and be computed from and after the end and expiration of the aforesaid eighteen calendar months, the said Richard Dunn to be bound in the sum of 100*l.*, and two sufficient sureties in the sum of 50*l.* each, and that the said Richard Dunn be further imprisoned in the said

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prison until such security be given. And that he, the said Richard Dunn, be committed to the custody of the keeper of the said prison, to be by him kept in safe custody in execution of this judgment.

Assignment of errors:—

Assignment of
Errors.

1. That it does not appear that the said John Fisher Miller, before whom the said oath was taken, as in the 6th count mentioned, had any authority to administer the said oath to the said Richard Dunn; and that by the law of the land he had no such authority; and that as it appears by the said 6th count, that the said oath was taken in the said Court of Bankruptcy which was then held, the said oath should have been administered by the said court and not by the registrar thereof.

2. That the said 6th count wants certainty, inasmuch as it does not appear whether the Court of Bankruptcy, in which the said oath was taken, was the Court of Review, or a subdivision Court of Bankruptcy, or before whom such court was held.

3. That neither the said Court of Bankruptcy nor the said registrar had authority to administer the said oath to the said Richard Dunn, as it does not appear that the said affidavit was made in any matter of bankruptcy.

4. That it does not appear in and by the said 6th count that the said oath was taken, or the said affidavit made, in any judicial or legal proceeding, or that the same was for the purpose or with the intention of being used in any legal or judicial proceeding.

5. That it does not appear in or by the said 6th count that any of the matters therein alleged to have been sworn were or could be material to any judicial or legal proceeding.

6. That it does not appear in and by the said 6th count that the said Angela Georgina Burdett Coutts could have been made a bankrupt upon the affidavit therein stated, inasmuch as no debt is sworn to or stated in the said affidavit to have been due from the said Angela Georgina Burdett Coutts.

7. That it does not appear in and by the said 6th count that any of the allegations in the said affidavit were false, inasmuch as the affidavit swears to a debt from Angela Burdett Coutts; and the indictment only negatives a debt from Angela Georgina Burdett Coutts.

8. That the said 6th count wants certainty in not setting forth the names of the persons on whom or on whose bank the said bill therein mentioned was drawn, the said persons being merely described as Messrs. Coutts & Company.

9. That the said Chief Justice had no authority in law to adjudge or order the said Richard Dunn to give security to keep the peace.

10. That the said Chief Justice had no authority in law to adjudge or order the said Richard Dunn to be imprisoned until such security was given.

11. That the said judgment is indefinite and uncertain, and manifestly unjust, inasmuch as although the said Richard Dunn is

ordered and adjudged to give security to keep the peace for two years only after the expiration of the said imprisonment for eighteen months as therein mentioned, yet if he does not give such security he is ordered and adjudged to be imprisoned for an indefinite and unlimited time.

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12. That the said indictment upon which the said judgment was so given by the said Chief Justice was not a record of the Court of Queen's Bench; but a record of the Central Criminal Court.

13. That the judgment of the said Chief Justice has not the force and effect of a judgment of the Court of Queen's Bench or any force or effect, inasmuch as the said court did, within six days after the commencement of the term ensuing the said trial, grant a rule to show cause why the said judgment should not be arrested.

The 1 & 2 Vict. c. 110, "An Act for abolishing Arrest on ^{1 & 2 V:} Mesne Process in Civil Actions, except in certain cases; for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England,"—enacts (s. 8, "manner of making a debtor a bankrupt"), if any single creditor, or any two or more creditors, being partners, whose debt shall amount to 100*l.* or upwards, or any two creditors whose debts shall amount to 150*l.* or upwards, or any three or more whose debts shall amount to 200*l.* or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit of debt and cause him to be personally served with a copy, &c., and if such trader shall not within twenty-one days after personal service of such affidavit, &c., pay such debt, or secure, or compound for the same, &c., he shall be deemed to have committed an act of bankruptcy on the twenty-second day.

5 & 6 Vict. c. 122, "An Act for the Amendment of the Law of ^{5 & 6 Vict.} Bankruptcy;" s. 11.—If any creditor of any trader within the meaning of this or any other statute relating to bankrupts now or hereafter to be in force shall file an affidavit (of debt and demand in the Court of Bankruptcy) in the form specified in schedule (A. No. 1.), it shall be lawful for the court to issue a summons calling upon such trader to appear.

Sect. 13.—If any such trader shall not come before such court at ^{Sect. 13.} the time appointed, or if upon his appearance he shall refuse to admit such demand and shall not make a deposition that he believes he has a good defence to such demand, then if such trader shall not *within fourteen days* after personal service of such summons pay, secure, or compound for such debt, to the satisfaction of such creditor, &c., every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such summons.

Sect. 67 of 5 & 6 Vict. c. 122.—All affidavits to be made and ^{Sect. 67.} used, in matters of bankruptcy, or under or by virtue of any statute relating to bankrupts or of this act, shall and may be sworn before the Court of Review or before either of the subdivision Courts in Bankruptcy, or any Commissioner, or the Master, or any Registrar or Deputy Registrar of the Court of Bankruptcy, &c

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1 Will. 4, c. 70,
s. 9.

Sect. 112 of 1 & 2 Vict. c. 110.—All affidavits to be used before the said court or any commissioner thereof, or any justices of the peace, or any officer of the said court, &c., shall and may be sworn before the said court, or any commissioner thereof, or any commissioner appointed by the said court for the purpose of taking affidavits, or any Master Extraordinary in Chancery, &c.

1 Will. 4, c. 70, s. 9, enacts, that upon all trials for felonies or misdemeanors upon any record of the Court of King's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by default or confession upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in court, excepting only where the prosecution shall be by information filed by leave of the Court of King's Bench, or such cases of informations filed by His Majesty's Attorney-General, wherein the Attorney-General shall pray that the judgment may be postponed; *and the judgment so pronounced shall be endorsed upon the record of nisi prius, and afterwards entered upon the record in court, and shall be of the same force and effect as a judgment of the court, unless the court shall within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had or the judgment amended;* and it shall be lawful for the judge before whom the trial shall be had either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment upon such terms as he shall think fit, until the sixth day of the ensuing term; and in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison.

Argument of
the plaintiff.

The *Plaintiff* in person argued in support of his writ of error.—

First, As to the authority to administer the oath; the question principally depends upon the construction of the 8th sect. of 1 & 2 Vict. c. 110, in conjunction with 5 & 6 Vict. c. 122, s. 11. This affidavit was sworn under the former act; which is an Act for the Relief of Insolvent Debtors, and the 112th section of which provides for the swearing of affidavits to be used before the Insolvent Debtors Court. Therefore neither the Registrar of the Court of Bankruptcy nor the Court of Bankruptcy itself had any authority to administer the oath. The section relied upon as giving that authority is sect. 67 of 5 & 6 Vict. c. 122; but the answer is that that applies only to affidavits "to be made or used in matters of bankruptcy, or under or by virtue of any statute relating to bankrupts, or of this act;" and this is not such an affidavit. It was not made or used in a matter of bankruptcy; it was not made by virtue of any statute relating to bankrupts, or by virtue of 5 & 6 Vict. c. 122. This was no matter of bankruptcy. Miss Coutts could not have been made a bankrupt upon this affidavit; for the 8th sect. of 1 & 2 Vict. c. 110, is altogether repealed by the 11th, 12th, & 13th sects. of 5 & 6 Vict. c. 122. [ALDERSON, B.—That is not so, unless they are necessarily inconsistent; and are they so?

Sect. 8 of 1 & 2 Vict. c. 110, provides that if within twenty-one days after personal service of the affidavit, and notice to pay therein mentioned, the trader shall not pay or compound, &c., he shall be deemed to have committed an act of bankruptcy on the twenty-second; but the 5 & 6 Vict. c. 122, s. 11, provides for the issuing of a summons to the trader upon the affidavit therein mentioned; and then by sect. 13 he is allowed only fourteen days after service of the summons within which to pay or compound for the debt.] An entirely different mode of proceeding is substituted; but the end is the same. The affidavit must now be in the form given by schedule (A. No. 1.), in order to be the foundation of an act of bankruptcy. The trader is entitled to be summoned before his nonpayment can be turned into an act of bankruptcy. But even if the 1 & 2 Vict. c. 110, were not repealed, that is not a bankruptcy act as the title shows; and therefore this affidavit does not fall within the terms of sect. 67 of 5 & 6 Vict. c. 122. [PARKE, B.—The title of a statute is no part of it; and raises no legitimate ground of argument.] Secondly, it is not proved nor does it at all appear that the affidavit set out in the indictment, or the statements therein contained, were in any way material to any legal or judicial inquiry. Upon this point the question, whether the 1 & 2 Vict. c. 110, s. 8, is repealed, is most important; because if that section has been rendered inoperative by the subsequent statute, the perjury is assigned upon a statement wholly immaterial; and an examination of the two provisions shows that the one supersedes the other. There is, however, the additional objection here, that the affidavit of debt is sworn against a person of one name; and the negative averments apply to a person of a different name. In Burn's Justice, tit. "Perjury" (ed. Chitty, 1837), p. 169, it is said—"The materiality of the perjury must be proved. If the matter referred to by the averment be material and affects the charge in such a manner that the omission of it would alter the character of the perjury assigned either in the degree in which it is charged to be injurious, or in the degree of guilt, the court will hold it must be strictly proved as it is charged, and the failure of proof, or the disproof of it would be fatal: (see Cowp. R. 229; *Teesdale v. Clement*, 1 Chit. R. 603; *Shepherd v. Bliss*, 2 Stark. 510; *R. v. Burdett*, 4 B. & Ald. 314.)" Thirdly, It does not appear that the affidavit was false, for the reason already mentioned,—that the affidavit speaks of a debt due from A. B. Coutts; and the indictment only negatives a debt from A. G. B. Coutts. And the substance of the affidavit must not be set out, but the document itself: (*Wright v. Clements*, 3 B. & Ald. 503.) [PARKE, B.—There is nothing in that point. ALDERSON, B.—There is this inuendo to the words A. B. Coutts, "meaning the said A. G. B. Coutts," which it was necessary to prove and which was proved.] Lastly, the sentence is unauthorized by law. It is no part of the punishment provided by law for this offence, that the defendant should be required to give security to keep the peace. The punishment of perjury is regulated by various statutes, which are collected in

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Hawk. P. C. c. 69, ss. 10, *et seq.*; and they give no authority to require sureties of the peace: (He referred to 5 Eliz. c. 9; 2 Geo. 2, c. 25; 9 Geo. 2, c. 8; 3 Geo. 4, c. 114.) This question was considered in *O'Connell v. Reg.* (11 Cl. & F. 295, and 1 Cox C. C. 413), but not decided. [ALDERSON, B.—In *O'Connell's case* the doubt arose in consequence of no time being named in the judgment for entering into the recognizance; but that difficulty does not arise here; the time of commencement is distinctly specified.] It has often been doubted whether this term can be added to the sentence; and if it cannot, the judgment is excessive and must be reversed: (*R. v. Ellis*, 5 B. & C. 395, 399.) Even if the sentence be correct, it was not pronounced by a competent authority. It was pronounced by Lord Denman at *nisi prius*, under 1 Will. 4, c. 70, s. 9, and that judgment has not the effect of a judgment of the court, because a rule to arrest the judgment was afterwards granted.(a) [PARKE, B.—We see the judgment of Lord Denman only; and know nothing of the rule. The questions really are, 1st. Is the 1 & 2 Vict. c. 110, repealed by the 5 & 6 Vict. c. 122? 2nd. Had the registrar power to take the affidavit? 3rd. Had the judge power to require the defendant to find sureties of the peace?]

Sir F. Thesiger's argument.

Sir F. Thesiger, *contra*.—This is an indictment at common law; and it is therefore immaterial whether the affidavit is a sufficient affidavit under either of the statutes. [PARKE, B.—The false oath must be on a material point, and can we treat this affidavit as material if no step could be taken upon it; if it is altogether abortive? The rule is, that the materiality must either be stated, or appear by necessary implication; now, how is that complied with, if under the 5 & 6 Vict. c. 122, this proceeding is altogether inoperative?] The question is, whether it is a proceeding material and necessary for the purpose intended; even if it could not be used, still perjury may be assigned. [PARKE, B.—The argument is, that the affidavit is not material, because it is not operative.] An affidavit to hold to bail may be insufficient for its purpose; and yet if it be false, perjury may be assigned upon it. At common law any false oath taken before a competent tribunal upon a matter material to the question, may be the subject of an indictment for perjury; and here the indictment states that Miss Coutts was a trader, and that the intention was to make her a bankrupt. But the 1 & 2 Vict. c. 110, s. 8, is not repealed by the later act (5 & 6 Vict. c. 122); under s. 11 of which a summons is issued upon the affidavit of debt, and bankruptcy follows in consequence of the summons, unless the debt is paid or settled. The time allowed for that purpose by the 1 & 2 Vict. is twenty-two days; by the 5 & 6 Vict. fifteen days. [ROLFE, B.—The first act may be still operative, because under that act no service of the affidavit is necessary; though under the later act it is. PARKE, B.—There is a difference as to the amount of the debt. A creditor

(a) Mr. Dunn had applied to the court to order that that rule should be annexed to or indorsed upon the record; but the court answered that they had no power to do so.

to the amount of 5*l.* cannot make his debtor a bankrupt under the first act. A large creditor may avail himself of the second if he likes; but a small creditor, whose debt is less than 100*l.*, cannot avail himself of the earlier act. Therefore the first is not repealed; and there is an end of the point as to materiality; for the affidavit is material under the 1 & 2 Vict. c. 110, s. 8. Then, was there power to administer the oath? The contrary must be shown; but at all events here the 5 & 6 Vict. c. 122, s. 67, gives the registrar the power to take affidavits in all "matters in bankruptcy, or under any statute relating to bankrupts." [CRESSWELL, J.—And the action under which this affidavit is sworn does relate to the making of bankrupts.] The only remaining point is, whether the judgment is warranted in point of law. The sentence of Lord Denman *at nisi prius* indorsed on the record has the effect of a judgment of the Court of Queen's Bench (stat. 1 Will. 4, c. 70, s. 9); and the superior courts have *ex officio* authority to add to the statutory punishment the requirement that the defendant shall give security to keep the peace. [CRESSWELL, J.—You say that it is part of the sentence, though not part of the punishment. PLATT, B.—Is perjury laid to be committed *contra pacem*?] Yes; and it is so laid in this indictment. In *Butt v. Conant* (1 Brod. & B. 548), it was held, that a justice of the peace may issue his warrant to apprehend a person charged with the publication of a libel, on the ground that it is a constructive breach of the peace; and in *Hazeldine v. Grove* (3 Q. B. 997), the authority of justices of the peace in cases of forgery and perjury was incidentally discussed. [ALDERSON, B.—In *R. v. Hart and White* (30 Sta. Tri. 1344), it was held, that this very sentence might be given.] In Burn's Justice (ed. Chitty, 1837), tit. "Surety for Good Behaviour," 913, it is said, "The truth is, binding to the good behaviour was a discretionary judgment at the common law given by a Court of Record for an offence at the suit of the king after a common law conviction by verdict of twelve men;" and the opinion of Wilmot, C. J. (*Wilkes v. The Queen*, Wilm. Notes, 334), is to the same effect.

PARKE, B.—Upon the construction of the statutes, we all think that the clause in the 5 & 6 Vict. c. 122, gives an additional power at a different time, and with reference to a different amount; and that the 1 & 2 Vict. c. 110, is not repealed. 2. Does it appear that the affidavit was material? we think it does; because it is in effect stated to be taken under 1 & 2 Vict. c. 110, s. 8. The only other point upon the indictment is, whether the officer had authority to take the affidavit; the averment is, that he took it as registrar; and under the 5 & 6 Vict. the registrar has power to take affidavits upon any matter in bankruptcy, or under any statute relating to bankrupts; and this is an affidavit in a matter, which, if it is not a matter in bankruptcy, at all events is under a statute which relates to bankrupts. With respect to the sentence requiring sureties of the peace, some of the court entertain some doubt; and we will therefore consider that point.

DUNN
v.
THE QUEEN,
—
Perjury.

Sir F. Thesiger's argument.

Judgment.

Cur. adv. vult.

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Perjury.

Judgment.

PARKE, B., now delivered the judgment of the court.—In this case, which was argued during the last sittings, several objections were taken to the judgment of the Court of Queen's Bench, and all of them were disposed of at the time, except one point, upon which part of the court entertained some little doubt. The question was, whether, upon a conviction for perjury, it was competent for the Court of Queen's Bench to make an addition to the sentence of imprisonment, and order that the defendant should find security for his future good behaviour, and to keep the peace, and to be imprisoned until that time. I believe no doubt would have been entertained if we had had access to the Journals of the House of Lords, in the case of *The King v. Hart and White*,^(a) in which that point was decided. It now appears, on referring to the journals, that the learned judges delivered their unanimous opinion in answer to the House of Lords, that in cases of misdemeanor, it was competent for the court to give that sentence. Therefore the judgment of the Court of Queen's Bench must be affirmed.

There would not have been the least difficulty if we had fortunately had the opportunity of looking at the journals of the House of Lords.

—(a) The question put to the judges arose out of the sentence against *Hart and White*, the printers and publishers of the *Independent Whig* for libels upon the administration of justice, and upon Lord Ellenborough, then Chief Justice. The question put was, whether a person convicted by the Court of King's Bench of a misdemeanor punishable by imprisonment, could by the judgment of the court be adjudged to give security for his good behaviour for a reasonable time, to be computed from and after the expiration of such imprisonment, in a sum named in such judgment. The answer was unanimously in the affirmative: (see 30, *State Trials*, 1337—1346; *House of Lords Journal*, Vol. 47, p. 27).

NORTHERN CIRCUIT.

YORKSHIRE WINTER ASSIZES, 1848.

York, December.

(Before Mr. Justice MAULE.)

REG. v. HUNT. (a)

Demurrer to the indictment—Duplicity—Addition—Repugnancy.

A count in an indictment, under the stat. 60 Geo. 3, c. 1, the first section of which prohibits assemblies of persons for the purpose of unlawfully "practising military exercise," and then goes on to impose a penalty on all persons who shall "train or drill" any other person, or who shall be trained or drilled, is not bad for duplicity, though it charges the offence which is prohibited, and the offence for which a penalty is imposed.

The omission of a prisoner's "addition" is not demurrable.

When the time for which an offence can be prosecuted is limited by statute, the omission to state the time of the commencement of the offence is not demurrable.

HENRY HUNT was indicted for having, on the 25th of May last, at Horton, in the West Riding, unlawfully trained and drilled a number of other persons to the practice of military exercise, movements, and evolutions. REG. v. HUNT.
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The prisoner had pleaded "not guilty."

T. Campbell Foster, on the part of the prisoner, applied to his Lordship to give the prisoner leave to withdraw his plea of "Not Guilty," in order to demur to the indictment. He referred to the case of *R. v. Purchase* (1 Car. & Mar. 617), on the authority of which he then proposed to demur orally.

His LORDSHIP, having referred to the case cited, assented to the application. The demurrer must be delivered in form afterwards, to make up the record.

Foster then proceeded to state the grounds of demurrer. There were eight counts in the indictment, each of which he should contend were bad for duplicity.

The first count of the indictment charged as follows:—

"The jurors of our lady the Queen upon their oath present that heretofore, to wit, on the 25th day of May A.D. 1848, and within six calendar months next before the commencement of this prosecution, at the parish of Horton, in the West Riding of the county of York, there was a certain unlawful meeting and assembly of Henry Hunt, late of the parish of Birstal aforesaid, in the Riding aforesaid, and county aforesaid; and of divers, to wit, twenty other persons, whose names are to the jurors aforesaid unknown, for the purpose then

(a) Reported by T. CAMPBELL FOSTER, Esq., Barrister-at-Law.

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and there of *unlawfully practising military exercise*, and which said persons so *then and there met and assembled together*, were then and there *without any lawful authority* from our said sovereign lady the Queen, or from the Right Hon. Henry Earl of Harewood, who then was and still is the Lord-Lieutenant of the said West Riding of the county of York, or from any Lieutenant of the said county or riding, or from any two justices of the peace of any county or riding, or of any stewardry, by commission or otherwise, for so meeting and assembling together as aforesaid, for the purposes aforesaid.

Indictment.

“And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Hunt, with force and arms, *and in the day and year aforesaid*, and within six calendar months next before the commencement of this prosecution, at the parish of Horton aforesaid, in the riding aforesaid, and county aforesaid, unlawfully was present at, and *unlawfully did attend THE SAID UNLAWFUL MEETING and assembly*, to wit, at the parish of Birtall aforesaid, in the riding aforesaid, and county aforesaid, *for the purpose then and there of unlawfully training and drilling divers, to wit, the said twenty persons* whose names are to the jurors aforesaid unknown, then and there unlawfully being present at, and then and there unlawfully attending the said unlawful meeting and assembly *to the practice of military exercise* against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.”

The first count contained two distinct averments, each averment sufficiently describing an offence against the statute under which the indictment was framed. If each averment in the count were to be treated as a separate and distinct count, then he should contend that each averment was bad as a separate count, the first for want of a formal conclusion *contra formam statuti*, the second for uncertainty. The indictment was framed on the 60th of Geo. 3, c. 1, s. 1. (a)

(a) The following is the section of the statute, 60 Geo. 3 & 1 Geo. 4, c. 1, (11th December, 1819):—An act to prevent the training of persons to the use of arms, and to the practice of military evolutions and exercise. “Whereas, in some parts of the United Kingdom, men, clandestinely and unlawfully assembled, have practised military training and exercise, to the great terror and alarm of His Majesty’s peaceable and loyal subjects, and the imminent danger of the public peace.” Be it enacted, “that all meetings and assemblies of persons *for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from His Majesty, or the Lieutenant, or two justices of the peace, of any county or riding, or of any stewardry, by commission, or otherwise, for so doing, shall be and they are hereby prohibited* as dangerous to the peace and security of His Majesty’s liege subjects, and of his government; and every person who shall be present at or attend any *such meeting or assembly for the purpose of training and drilling any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall train or drill any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall aid or assist therein, being legally convicted thereof, shall be liable to be transported for any term not exceeding seven years, or to be punished by imprisonment, not exceeding two years, at the discretion of the court in which such conviction shall be had; and every person who shall attend or be present at any such meeting or assembly as aforesaid, for the purpose of bearing, or who shall at any such meeting or assembly be trained or drilled to the use of arms or the practice of military exercise, movements, or evolutions, being legally convicted thereof, shall be liable to be punished by fine and imprisonment, not exceeding two years, at the discretion of the court in which such conviction shall be had.*”

The first part of that section declared that all meetings of persons for the purpose of practising military exercises, without lawful authority, were prohibited. The section then went on to provide that all persons who attended such meetings for the purpose of "training and drilling any other person to the use of arms, or the practice of military exercise," &c. should be subjected to certain penalties. The first averment of the 1st count stated, that on the 25th of May there was "a certain unlawful assembly" of the prisoners and others at the parish of Horton, "for the purpose of then and there practising military exercise," without any lawful authority. The averment followed the words of the prohibitory part of the section of the statute, and sufficiently stated an offence prohibited by the statute. To commit the offence prohibited was therefore a contempt of the statute, and as such was indictable as a distinct offence: (1 Hawk. P. C. c. 22, s. 1.) In 2 Hawk. P. C. c. 25, s. 4, it was stated that "wherever a statute prohibits a matter of public grievance to the liberty and security of a subject, an offender against such statute is punishable by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it." The statute also constituted this offence a misdemeanor, and the averment sufficiently stated an attempt to commit the offence, resting not in bare intention. The attempt to commit a misdemeanor was itself a misdemeanor, and indictable as such: (*Rex v. Higgins*, 2 East, Rep. 21.) On this ground, also, the first averment of the count sufficiently stated a distinct and indictable offence: (1 Russ. by Grea. 48.) There were, however, express decisions on this point. In 2 Hale's P. C. fo. 171, it was stated, that "if an act does also contain a prohibitory clause, the offender may be indicted upon the prohibitory clause, notwithstanding the penalty." And Lord Mansfield, in giving judgment in the case of *Rex v. Wright* (1 Burr. 543), stated, "that where new created offences are only prohibited by the general prohibitory clause of an act of Parliament, an indictment will lie." And Mr. Justice Denison, in the same case, said, "an indictment will lie where there is a substantive prohibitory clause in an act of Parliament, though there be afterwards a particular provision, and a particular remedy given." In *Rex v. Harris* (4 T. R. 205), the same doctrine was held by Mr. Justice Ashurst, that "it was not necessary for a prosecutor to sue for the penalty, but he might proceed on the prohibitory clause, on the ground of its being a misdemeanor:" (1 Russ. 49.) The first averment of the count, for these reasons, the learned counsel contended, set out a complete offence, namely, a misdemeanor, for doing that which was prohibited by the statute. Then the second averment of the count contained another distinct charge, framed on succeeding portions of the same section of the statute, and charged the prisoner with "unlawfully attending the said unlawful meeting, for the purpose, then and there, of unlawfully training and drilling," &c., certain persons "to the practice of military exercise." This was a suffi-

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cient allegation of the offence under the statute, and was, therefore, a second and distinct offence, charged within the same count, which was clearly bad at common law for duplicity: (*R. v. Purchase*, 1 C. & M. 620.) If it were contended that each averment of the count was a separate count of the indictment, he should then submit that each averment, taken separately, was bad. The first had no conclusion *contra formam statuti*, which in a new offence created by statute was a fatal fault: (Arch. Crim. Pleading, 56; 2 Hawk. P. C. c. 25, s. 116.) Then the second averment was bad for uncertainty, for no certain time or place was alleged, and the unlawful meeting was termed "the said unlawful meeting;" and, though time and place might be supplied by reference to previous averments of time and place, facts and circumstances on which the charge was founded could not be so introduced. The next objection he urged to the count was that there was no addition of the prisoner's "estate, degree, or mystery" after his name, as required by the Statute of Additions, which was not repealed; and though it was laid down in the books that this objection was usually taken by plea in abatement, yet there was no authority which ruled that it might not be raised on demurrer.

MAULE, J.—Is there any that it can?

Foster's argu-
ment for the
prisoner.

Foster was not aware of any decision on the point either way. Besides, irrespective of this being a fault under the Statute of Additions, it rendered the charge uncertain as to the identity of the prisoner. Lord Coke (2 Inst. 669), stated that "the end and purview of the Statute of Additions was that the person of the defendant should be so described by certain additions as one man might not be troubled for another." And, by the common law, a man "ought to be named by his Christian name and surname, and by the addition of his name of dignity:" (Co. 2nd Inst. 666.) In this case, how could the prisoner plead *autrefois acquit* or *autrefois convict* with certainty? There might be twenty other Henry Hunts in his parish, of different degree, estate, and mystery—as a knight, an esquire, a clerk, and an attorney. On this ground the count, he submitted, was bad; first, for the omission of the addition; and, secondly, because of the uncertainty. The next objection was that the 7th section of the 60th Geo. 3, c. 1, under which the charge was preferred, enacted, that proceedings under that statute must be commenced within six calendar months from the commission of the offence; (a) and, although each count in the indictment stated that the offence had been committed within six calendar months, yet there was no *videlicet* alleging a date for the commencement of the prosecution. This was an averment of a material fact; for, unless the prosecution was shown to have been commenced within six calendar months, the court had no jurisdiction to try the offence. The learned counsel contended that the count was bad for the omission

(a) The following is the section:—"No person shall be prosecuted by virtue of this act for anything done or committed, &c. &c., unless such prosecution shall be commenced within six calendar months after the offence committed."

to state any time to this material fact. Hawkins, in his Pleas of the Crown (Vol. 2, c. 25, s. 77,) says, "it is laid down as an un- doubted principle in all the books that treat of this matter, that no indictment whatsoever can be good without precisely showing a certain year and day of the material facts alleged in it." The commencement of the prosecution, also, must, because of the omission, be taken to be the finding of the indictment by the grand jury, the date of which, according to the caption of the indictment, would be the first day of the assize, or the 11th of December, whilst the offence in the indictment itself, was alleged to have been committed on the 25th of last May, more than six months before. Each count of the indictment was, therefore, in this respect, repugnant, and on the face of it showed no jurisdiction under the statute. In furtherance of this argument, also, the learned counsel referred to the terms of the recognizances of witnesses bound over to prosecute. They were bound over "to prosecute at the assizes;" that which they were bound to do was to be done "at the assizes," and what they were to do was to "prosecute" at the assizes. The finding of the inquisition by the grand jury must, therefore, be looked at as the commencement of the prosecution. For these reasons, he submitted, that the count was bad on demurrer, for duplicity, uncertainty, and repugnancy, and showed no jurisdiction to try the offence. The other counts were open to the same objections.

MAULE, J.—I am of opinion that the objections raised cannot prevail. If several offences were charged, that was no reason why the indictment should be bad; and as to their being charged in one count, a count was of modern invention for convenience. The second part of the count had reference to the first, for the first part could not be taken to be expunged. The course of practice was to take advantage of an omission of "estate, degree, or mystery" by a plea of abatement, and the judge might then amend the indictment in that respect. If there were any authority to show that this was an objection which could be raised on demurrer, then, no doubt, it was a good objection; but he should not so hold in the absence of any such authority. Then, as to the prosecution not being commenced within six calendar months, there were two answers; all the steps taken before any constituted tribunal are steps in the prosecution. Suppose that were doubtful, there was yet a distinct averment that the offence had been committed within six calendar months before the commencement of the prosecution, and it was within the prescribed time from the taking of the first step. Then a recognizance was a continuing bond, like a replevin bond, which bound the witnesses to give evidence in the prosecution from the time it was entered into. The judgment must be for the Crown.

Foster then asked his lordship if he would give judgment of *respondeas ouster*; it was within the discretion of the court so to do.

His LORDSHIP said he should not in this case; it was a misdemeanor, and there were no merits on the facts.

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Drilling—
Indictment.

Judgment of
MAULE, J.

NORTHERN CIRCUIT.

YORKSHIRE WINTER ASSIZES, 1848.

York, December.

(Before Mr. Justice MAULE.)

REG. v. METCALFE AND SLATER.

Misnomer of juryman—Mistrial.

If a juryman, on calling over the names of the panel, answer to a wrong name, and be sworn by the wrong name, the trial is a mistrial, for the prisoner has not had his opportunity of challenging the juryman misnamed.

REG.
v.
METCALFE
AND
SLATER.

Jury-Practice.

JOHN METCALFE and Robert Slater were indicted for a highway robbery, with violence on Thomas M'Donald, at Gevendale, on the 20th of August.

Blanchard (with him *Travis*), for the prosecution; *Overend* defended Metcalfe. The other prisoner had no counsel.

His LORDSHIP having summed up, the jury retired. On their return, their names being called over, no one answered to the name of "Jno. Dunn," whose name was on the panel as one of the jurors; and it appeared that a juryman, whose name was John Turner, had answered to the name of John Dunn, and been sworn in that name by some mistake.

MAULE, J.—It is a most unfortunate thing. If any one objects, I shall consider the objection before the jury deliver their verdict.

Overend objected to the proceedings on the part of Metcalfe.

MAULE, J. (to the other prisoner).—Your attention was called to the name of John Turner in challenging instead of to the name of John Dunn. Do you object too?

Prisoner Slater.—Yes.

MAULE, J.—Do you wish this jury to be discharged, and that there should be a new trial?

Overend.—I wish nothing, my lord.

Blanchard.—On the part of the prosecution, I am content to take the verdict.

MAULE, J.—Ask the jury what their verdict is?

Verdict, *Guilty*.

It appeared that there was another indictment against the prisoners arising out of the same transaction, and his lordship ordered them to be tried on that indictment.

(a) Reported by T. CAMPBELL FOSTER, Esq., Barrister-at-Law.

CENTRAL CRIMINAL COURT.

August 22, 1848.

REG. v. SPRY AND DORE. (a)

Murder—Practice—Order for inspection by prisoners.

An application was made before trial on the part of the accused, that a surgeon named by them should be permitted to inspect the stomach of the deceased person, which was then in the possession of a police officer. The application was granted, and an order made that the inspection should take place in the presence of the police officer, and of the medical persons who had examined it on the part of the prosecution, the expense to be borne by the prisoners, and the coroner to have notice of the time and place of the examination. Form of order.

THE coroner's jury having returned a verdict of wilful murder against the prisoners,

Clarkson applied on their behalf, previous to the trial, that Dr. Taylor might be permitted to inspect the stomach of the deceased and its contents, which were at present in the keeping of a police inspector. He considered it absolutely essential to the interests of the accused that this should be done, in order that they might be prepared at the trial with evidence, which nothing but a minute examination could furnish.

THE RECORDER.—This is a very unusual application, and one that I am not quite sure the court has jurisdiction to entertain; but as it appears to be made in furtherance of the interests of justice, I think I may take upon myself to make the order. The examination, however, should take place in the presence of the officer who has custody of the stomach, as well as in that of the medical gentleman who examined it on the part of the prosecution. The expense must be borne by the prisoners, and I think the coroner should have notice of the time and place of the examination. I have the less difficulty in granting this application, because the judge would no doubt at the trial stop the case until such examination had been made. The following order was then drawn up:—

Central Criminal Court, } At the General Sessions of Oyer and Terminer, and General Session of the
to wit. } Delivery of the Queen's Gaol of Newgate, holden for the jurisdiction of the Central Criminal Court at Justice Hall, in the Old

REG.

v.

SPRY

AND

DORE.

Murder—Practice.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

REG.
v.
SPRY
AND
DORE.
—
*Murder—
Practice.*

Bailey, in the suburbs of the City of London, on Monday the 21st day of August, 1848.

The Queen
against
Mary Spry
and
Mary Ann Dore.

Whereas by the affidavit of George Henry Sawtell, it hath been made to appear to this court, that the stomach of a certain infant child, deceased, named Mary Ann Theresa Dore, for the wilful murder of whom, by poison, the said Mary Spry and Mary Ann Dore are to be tried in this court, is now in the possession of Julian Edward Distrowe Rodgers, of the School of Medicine, Grosvenor-place, in the county of Middlesex. And whereas, by the same affidavit, it has been made further to appear that certain medicine to be produced upon the trial of the said Mary Spry and Mary Ann Dore, for the said murder, is in the possession of William Moran, Inspector of Police, at the Police Station, Vincent-square, Westminster. And whereas it hath been made further to appear to this court to be highly important to the ends of justice, that the said stomach and its contents, as well as the said medicine, or some portion thereof respectively, should be submitted to the examination and analysis of some competent person, on the part of the said Mary Spry and Mary Ann Dore, in the manner hereinafter directed, of and concerning the same. And whereas A. S. Taylor, Esq., of No. 3, Cambridge-place, Regent's Park, Professor of Chemistry, is represented to this court as a fit and proper person for making such examination and analysis. Now it is ordered, for the purpose of such examination and analysis, that the said stomach and its contents, as well as the said medicine, or such portions thereof respectively as the said A. S. Taylor may deem necessary for the purpose aforesaid, be handed over by the said parties respectively to the said A. S. Taylor: and that the said examination and analysis of the said stomach and its contents, and of the said medicine, or such portions thereof as aforesaid, be proceeded with at Guy's Hospital, in the Borough of Southwark, but in the presence, nevertheless, of the said person in whose possession the same now are respectively as aforesaid, and that this order shall be sufficient warrant and authority to the said persons, and each of them, for permitting the said analysis and examination in manner aforesaid.

Form of order.

By the Court,

JOHN CLARK,
Clerk of the said Court.

CENTRAL CRIMINAL COURT.

FEBRUARY SESSION.

February 2, 1849.

R. v. KIMBER. (a)

11 & 12 Vict. c. 42, s. 18—*Proof of prisoner's statement before magistrate.*

Semble, that for the purpose of proving a prisoner's statement on his examination before a magistrate, it is not sufficient that the form given in schedule (N.) to the 11 & 12 Vict. c. 42, has been read over to the prisoner; but that there must be some proof that the caution mentioned in the proviso contained in the latter part of the 18th section has been also given.

THE prisoner was indicted for forgery, and at the close of the R. v. KIMBER.
case

Platt (for the prosecution) offered in evidence a statement made by the prisoner before the magistrate, and which was set out in the depositions. Appended to the statement was a declaration by the magistrate that he had, previously to the prisoner's being called upon for his defence, repeated the form contained in schedule (N.) of the 11 & 12 Vict. c. 42, but there was nothing to show that the caution contained in the latter portion of the 18th section of that statute had been used.(a)

*Evidence—
Prisoner's
Statement.*

(a) The section in question is as follows:—

"And be it enacted, that after the examination of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial:' and whatever the prisoner shall then say in answer thereto shall be taken down in writing (N.) and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned, and afterwards upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

R. v. KIMBER.

Evidence—
Prisoner's
Statement.

Parry (for the prisoner) contended that the statement could not be read, as the statute had not been fully complied with. The latter portion of the section was in the nature of a proviso, and proof must be given of a strict compliance with its terms.

Platt.—All is stated here that is requisite for the purpose of giving the prisoner's statement in evidence. The form given by the statute has been scrupulously adhered to. The rest is a mere direction to the magistrate which it is to be presumed he has complied with.

COLERIDGE, J., after consulting CRESSWELL, J., said, that they were both inclined to think that the proviso was a condition precedent, and that in the absence of any proof that it had been acted upon, the statement was not receivable in evidence, but they added that as it was desirable so important a point should be settled, they would receive the evidence and reserve the question if it should become necessary.

The prisoner was, however, acquitted.

in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.

SCHEDULE (N.)

Statement of the Accused.

A. B. stands charged before the undersigned of her Majesty's justices of the peace in and for the aforesaid, this day of in the year of our Lord for that the said *A. B.* on at and the said charge being read to the said *A. B.*, and the witnesses for the prosecution, *C. D.* and *E. F.*, being severally examined in his presence, the said *A. B.* is now addressed by me as follows:—"Having heard the evidence, do you wish to say anything in answer to the charge; you are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing and may be given in evidence against you upon your trial;" whereupon the said *A. B.* saith as follows: [here state whatever the prisoner may say, and in his very words as nearly as possible. Get him to sign it if he will.]

Taken before me at

the day and year first above mentioned.

(Signed)

*A. B.**J. S.*

WESTERN CIRCUIT.

SOMERSET SUMMER ASSIZES, 1848.

Wells, August.

(Before Mr. Justice COLERIDGE.)

REG. v. JOSEPH PHILLIPS, JAMES WILLIAMS, THOMAS
MATHEWS, AND ROBERT BROWN. (a)*Assault with intent, &c.—Common assault.*

R. B. was indicted, with three others, for an assault with intent to do some grievous bodily harm. It was proved that he, with the other prisoners, had assaulted the prosecutor, and afterwards they had returned together and picked up some stones. Then R. B. withdrew, and the other prisoners threw the stones and wounded the prosecutor. The jury found the three prisoners who threw the stones, guilty of the felony, and R. B. guilty only of a common assault. Held, that R. B. was rightly convicted.

PRISONERS were indicted for feloniously assaulting Charles Wilton by throwing stones at him, cutting and wounding him thereby, with intent to do him some grievous bodily harm.

It was proved that, on the 7th of June, the prisoners went to a farmhouse, begging. The female servant requested them to go away, and on their refusal to do so, sent for the prosecutor, who endeavoured to remove them from the premises by force. A scuffle ensued, and all four of them fell upon him, and he was thrown on the ground under them. The prisoners then got over the lawn into an adjoining orchard, and began to pick up stones. But prisoner Brown, having done this with the rest, stood aside and took no further part in the transaction; the other three threw the stones so collected, one of which struck the prosecutor on the head and much injured him.

The jury found the three prisoners who had thrown the stones guilty of an assault with the felonious intent; but prisoner Brown guilty of a common assault only.

T. W. Saunders, for prisoner Brown, contended that on this finding he was entitled to an acquittal. It had been decided by the judges in the case of *Reg. v. Birch and another* (2 Cox's Crim. Cas. 22), that the statute which permitted the conviction for a common assault upon an indictment for a felony which included an assault, was applicable only where the assault found and the felony charged were the *same acts*. In this case the jury had, by their verdict, found that Brown was not engaged in the particular assault of

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v.
PHILLIPS
AND
OTHERS.
—
Assault.

(a) Reported by EDWARD W. COX, Esq. Barrister-at-Law.

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—
Assault.

which the others were convicted. He cited the case of *Reg. v. Barrett and others* (2 Car. & Kir. 594).

COLERIDGE, J. said that his impression was that the conviction was good. But he would consult his brother Williams. On the following morning, he said—

Judgment.

I have considered this case with my brother Williams, and we are of opinion that the prisoner was rightly convicted. The words of the statute are very general. It is enacted by 7 Will. 4 & 1 Vict. c. 85, s. 11, "That on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." Nothing can be more general than these words. According to them, if taken in their widest sense, it would be competent to a jury to convict of a common assault in any case in which an assault formed any part of the transaction. But the judges have deemed it necessary to put some restriction on this large interpretation, for the reasons stated in a well-considered note by Mr. Greaves in his edition of Russell on Crimes, v. 1, p. 782, which it is not necessary for me to read.^(a) In the case of *Reg. v. Birch and another* (2 Cox's Crim. Cas. 22), it appears that the indictment was in the usual form, charging that the prisoners "in and upon one Charles Darley, &c., did make an assault." On the trial, the prosecutor did not appear, and no evidence was given to support the charge of robbery; but a witness,

(a) Mr. Greaves' note is as follows:—"It may admit of some doubt whether the construction of sect. 11 of the 1 Vict. c. 85, is finally settled. The framer of the clause probably intended that the clause should apply to those cases where, upon an indictment for a felony, including an assault, the jury should acquit on the ground that the felony, although attempted, was not completed. But if such were the intention, the words do not so clearly express it as they ought, as they authorize the jury to convict 'of assault' on any indictment for felony 'where the crime charged shall include an assault.' These words are so general that they might include any assault, whether at the time of the felony charged or not; and the learned judges have therefore been obliged to put some limitation upon them, and the proper limitation seems to be that which has been put upon them by the very learned Baron in *Rez v. St. George*, namely, that *the assault must be an assault involved in and connected with the felony charged*; and it is submitted that it must be such an assault as is essential to constitute part of the crime charged. A felony including an assault may be said to consist of the assault, the intent to commit the felony, and the actual felony. Thus in robbery there is the assault, the intent to rob, and the actual robbery; and in such a case it is submitted the assault, of which the prisoner may be convicted, must be such an assault as constitutes one step towards the proof of the robbery. Upon this the question arises, whether an assault, where the jury negative any intention to commit a felony, is within the section, and it is submitted that it is not, as such an assault cannot be said to be involved in or connected with the felony charged in any manner whatsoever. It is true that an assault is included in the felony, but it is an assault coupled with an intent, and if the jury negative the intent, such an intent in no way tends to prove the felony; and it certainly would be a great anomaly if the prisoner were indicted for a felony, and the jury found that he had no intention of committing a felony, that he might be sentenced to three years' imprisonment and hard labour, while if he had been indicted for the offence of which he really was guilty, he could only be sentenced to imprisonment without hard labour. *Reg. v. Ellis* (8 C. & P. 654), therefore seems deserving of reconsideration, and the more so as it was decided before *Reg. v. Guttridge* (9 C. & P. 471); *Reg. v. St. George* (9 C. & P. 483); *Reg. v. Phelps* (Gloucester Sum. Ass. MS. cited 1 Russ. 781). The intention, no doubt, was to punish attempts to commit felonies, including assaults, and it is to be regretted that the provision, instead of being what it is, was not that upon any indictment for felony, if the jury should think that the felony was not completed, they might find the prisoner guilty of an attempt to commit the felony charged in the indictment.

who was present at the time and place at which the robbery was supposed to have been committed, proved an assault upon the prosecutor by Birch, one of the prisoners. The jury were directed by Mr. Armstrong, who was presiding, after consultation with my brother Patteson, to acquit the prisoner of the felony, but to find Birch guilty of a common assault, and on the point reserved for the opinion of the judges, the conviction was held to be right, on the ground that, under the 11th section of 1 Vict. c. 85, it was not necessary to show that the assault was made with the intention of committing the felony charged in the indictment; but it was enough if the assault charged in the indictment and the assault proved were the same. It appears from this that there are two requisites to sustain such a conviction; first, an assault must be included in the charge: secondly, it must be proved to be a part of the *very* act or transaction; and the question here, as in all similar cases, is, was the assault a part of the transaction? Now the facts are, that four persons engage in a common assault, then, being interrupted, Brown and the other three prisoners retreat and collect stones, of course with the purpose of throwing them; but before they execute this purpose, Brown repents and retreats, and the other three proceed to carry out the design and commit the felony in which Brown took no part. It was in truth an act commenced by the four, but which three executed. The case of *Reg. v. Barnett and others* (2 Car. & Kir. 595), cited by Mr. Saunders, differs from this; there the assault and the robbery were two distinct transactions. One man committed an assault and the other two took advantage of it to commit a robbery. No concert was shown between them, nor had they been engaged in any common design. As one mode of trying this, let us see whether they might be now indicted for a common assault. But certainly if they were to be so indicted they might successfully plead *autrefois convict*.

Conviction affirmed.

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AND
OTHERS.
—
Assault.

Judgment.

YORKSHIRE WINTER ASSIZE, 1848.

York, December 9.

REG. v. FANNY ARCHER.(a)

*Witness—Admissibility of evidence of a party to the record.**A prisoner convicted of an offence, who was jointly indicted with another afterwards put upon his trial, is an admissible witness for the prisoner on trial, although individually named on the record.*

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v.
ARCHER.
—
Witness.

THE indictment, which was found at the last Summer Assizes, charged Eliza Lynch with robbery and Fanny Archer with aiding and assisting Eliza Lynch, who was tried, convicted, and sentenced at the former assizes; but Fanny Archer, not having been then apprehended, was not put upon her trial until the present gaol delivery.

Travis, for the prosecution, proposed to call Eliza Lynch as a witness.

J. H. Hill, for the prisoner, objected to this course, and contended that she was not admissible under 6 & 7 Vict. c. 85, s. 1, because it is thereby expressly provided, that that act shall not render competent any party to any suit, action, or *proceeding* individually named in the record.

MAULE, J., held that she was admissible as a witness; and stated that in a case at the Old Bailey there was a great deal of talk about the matter, but no question on that point was subsequently raised.

The prisoner was acquitted on the merits.

(a) Reported by T. CAMPBELL FOSTER, Esq., Barrister-at-Law, Northern Circuit.

COURT OF QUEEN'S BENCH.

May 2, 1848.

REG. v. JAMES BUTTON AND OTHERS. (a)

Indictment for conspiracy—Merger of misdemeanor in felony.

Upon an indictment for misdemeanor it is no ground for an acquittal, that the evidence necessary to prove the misdemeanor also shows that it is part of a felony, and that the felony has been completed. Thus upon an indictment for a conspiracy to commit larceny, and charging that in pursuance of that conspiracy the larceny had been committed, the defendant is not entitled to an acquittal, though the evidence proves that he was guilty of felony, the conspiracy proved making him an accessory before the fact to the crime of larceny.

The indictment charged that one C. L. was a dyer, and had in his possession vats and dye; and that the defendants were employed by the said C. L. as his servants, &c., and that it was their duty to use the said vats and dye for the profit and advantage of the said C. L., and for the dyeing, &c. of such woollen, &c., and other materials as might belong to themselves, or be entrusted to them by the said C. L. for the purposes aforesaid, and to use the vats and dye for no other purpose, and upon no other materials; and that the defendants conspired fraudulently and without the consent of C. L. to use the said vats, &c. in the dyeing of materials not belonging to themselves, and not entrusted to them by C. L. for that purpose, and to obtain for themselves profits, and to deprive C. L. of the proper use of the said vats and dye; and that in pursuance of that conspiracy the defendants did wilfully, and without the consent of the said C. L., receive materials, and wilfully and without the consent of C. L., at his expense and with his dye, vats, &c. dye the said materials for their own profit.

Held, good in arrest of judgment; and that as it was unnecessary to prove the overt act, the objection that the offence of conspiracy was merged in a felony did not arise upon the face of the indictment; though, if it had arisen, it could not have been sustained.

INDICTMENT for conspiracy.

The third count stated, that before and at the time of the conspiracy hereinafter next mentioned, one Charles Lewis carried on the trade and business of a dyer, and had in his possession, and upon his premises, divers large vats, and large quantities of dye, and other implements necessary for the carrying on the trade and business last aforesaid, and that the defendants, James Button, George Button, William Welsford, and Thomas Cordery, were employed and retained by the said C. L. as his servants in and about the management of the said last-mentioned trade and business. And that it

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OTHERS.
—
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(a) Reported by A. BITTLESTON and E. WISE, Esqrs., Barristers-at-Law.

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Indictment
3rd count.

was their duty as such servants to employ and use the last-mentioned vats, dye, and other implements in and for the benefit, profit, and advantage of the said C. L., and for the dyeing, preparing, and working up of such woollen, silken, cotton, and other materials as might belong to themselves, or be entrusted to them by the said C. L. for the purposes last aforesaid, and to employ and use the said last-mentioned vats, dye, and other implements for no other purposes, and upon no other material whatsoever. And the said J. B., G. B., W. W., and T. C., on, &c., did unlawfully conspire, combine, confederate, and agree, together and with other persons whose names are to the jurors unknown, fraudulently and without the consent of the said C. L., to use and employ the said vats, dye, and other implements in and about the dyeing, preparing, and getting up of divers large quantities of woollen, cotton, and silken materials not belonging to themselves, and not entrusted to them by the said C. L. for that purpose; and to obtain and acquire to themselves by the means last aforesaid, divers large profits and advantages, and to deprive the said C. L. of the proper use and benefit of the said last-mentioned vats, dye, and other implements. And that the said J. B., G. B., W. W., and T. C., did, in pursuance of the said last-mentioned combination, conspiracy, and agreement, on, &c., wilfully and without the consent of the said C. L. receive, and take into their possession, divers large quantities of material, that is to say, 1,000 yards of woollen materials, 1,000 yards of linen materials, 1,000 yards of fustian materials, 1,000 yards of cotton materials, 100 yards of leather, 100 yards of fur, 100 yards of mohair, and 1,000 yards of silken materials, and did wilfully and without the consent of the said C. L. at his expense, and with his aforesaid dye, vat, and other implements, dye and prepare, and cause, permit, and procure to be dyed and prepared, the said last-mentioned large quantities of materials, and for their own profit and advantage, to the great damage of the said C. L., and against the peace of our said lady the Queen, her crown and dignity.

4th count.

Fourth Count.—Charged that before and at the time of the conspiracy hereinafter mentioned the said C. L. carried on the trade and business of a dyer, and that the said J. B., G. B., W. W., and T. C. had engaged themselves, and were employed and retained by the said C. L. as his servants in and about the management of the said trade and business on his behalf, and for certain wages to be paid to them, which had before that time been agreed upon. And that the said J. B., G. B., W. W., and T. C., on, &c., did amongst themselves and with divers other persons, whose names are to the jurors unknown, unlawfully conspire, combine, confederate, and agree, by artful means and devices, to obtain and acquire to themselves divers large sums of money, by fraudulently and without the consent of the said C. L., using the dye and implements of trade of the said C. L. in and upon the dying and otherwise preparing and working upon of divers large quantities of woollen, cotton, linen, and

other materials, for their own use and benefit and to the injury and loss of the said C. L., in his last-mentioned trade and business. And that the said J. B., G. B., W. W., and T. C., in pursuance of the said last-mentioned conspiracy, combination, and agreement, to wit, on, &c., wilfully and without the consent of the said C. L., receive and take into their possession divers large quantities of materials, that is to say, 1,000 yards of woollen materials, 1,000 yards of linen materials, 1,000 yards of cotton materials, 100 yards of leather, 100 yards of fur, 100 yards of mohair, and 1,000 yards of silken materials, and did wilfully and without the consent of the said C. L., at his expense and with his dye-vat and other implements, dye and prepare, and cause, permit, and procure to be dyed and prepared the said last-mentioned large quantities of materials for their own profit and advantage, to the great damage of the said C. L., and against the peace of our lady the Queen, her crown and dignity.

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Plea, Not Guilty.—At the trial at the sittings after Michaelmas Term, 1846, before Mr. Justice Erle, it was proved that the defendants were in the employ of the prosecutor, who was a dyer, and had, with the dye and materials belonging to him, on various occasions dyed for persons who brought goods to be dyed, and received the money for their own use. It was then objected that the facts proved a felony, for that it was either a larceny of the dyeing materials, or an embezzlement of the money received for the dyeing; and that the misdemeanor charged was merged in the felony. His Lordship overruled the objection, and the jury returned a verdict of guilty. A rule was subsequently obtained on the ground of misdirection, and also in arrest of judgment—against which (January 12),

Sir F. Thesiger, Ballantyne and Peacock, showed cause.—The objection is that, inasmuch as by the felony being afterwards committed in pursuance of the conspiracy the defendants became accessories before the fact and guilty of felony, the misdemeanor therefore merged in the felony. Even assuming that the evidence proved a felony, the objection cannot be maintained. The doctrine of merger is one for which little authority can be found at common law. The only way in which it could be solemnly decided would be in a plea of *autrefois acquit*, or *autrefois convict*; but there is no such authority. In *Reg. v. Cross* (1 Ld. Raym. 711), the question arose upon the effect of a statute creating an offence. It was an indictment for a misdemeanor for receiving stolen goods, and judgment was arrested on the ground that by 3 & 4 Will. & M. c. 9, s. 5, the offence had been declared a felony, and could no longer be treated as a misdemeanor. It is difficult to assign a reason for the doctrine. Was it supposed that the crown might lose the forfeiture? In *Reg. v. Neale* (2 Car. & K. 591), the prisoner was indicted for a misdemeanor in having carnally known a child under twelve years of age. The jury found that he effected his purpose by force and against the child's consent, but the fifteen judges held that he might be convicted of the statutable misdemeanor, although

Argument for
the crown.

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another offence being a felony was also proved to have been committed. *Isaac's case* (2 East, P. C. c. 21, s. 8, p. 1031), will be cited on the other side, but that cannot be supported since *Reg. v. Neale*. There the prisoner was indicted for a misdemeanor in setting fire to a house in his own occupation contiguous to other houses. The evidence proved that he had set fire to his house for the purpose of defrauding an insurance company, and was therefore also guilty of a felony. Mr. Justice Buller held that the misdemeanor was merged in the felony, and directed an acquittal. In *Rex v. Storey* (Russ. & Ry. 8), the prisoner was indicted for a misdemeanor in obtaining money under false pretences, and the evidence was, that he had pretended to the post-mistress, from whom he received the money, that he was John Storey, to whom a money order was payable, and that he signed a receipt in his own name. Chambre, J., doubted whether the signature amounted to a forgery, but said, that if it was, "the lesser offence would have been merged." The judges, however, held that there was no forgery, and the point therefore was not decided. In *Rex v. Evans* (5 Car. & P. 333), the prisoner was indicted for obtaining goods under false pretences as a misdemeanor, and the evidence proved that he had uttered a forged request for the delivery of the goods; and Mr. Justice Taunton directed an acquittal on the ground of merger. But that case is distinguishable, as the offence was made a felony by 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, and therefore in effect it is declared not to be a misdemeanor. But even if the doctrine of the merger should be held to be applicable, where the *corpus delicti* is single, it does not apply in the present case. To establish the charge of conspiracy, no acts need be proved, and how, then, can that which is done subsequently alter the nature of the offence already committed? [LORD DENMAN, C. J.—If indicted for the conspiracy, is the defendant to purge himself by committing a felony?] That must be contended if the conspiracy in this instance is to be held to be merged. [PATTESON, J.—Suppose A., B., and C., were indicted for conspiring to murder D., and there was the evidence of some one who overheard them consent to the murder; and that they afterwards were seen to commit the murder; could they be convicted of the conspiracy? LORD DENMAN, C. J.—What would be the form of application to prevent the conviction? Is it a matter for the jury who are empanelled to decide aye or no whether a particular offence has been committed, that another offence of a higher nature has been committed?] There is no such plea as that the conspiracy gave rise to a felony being committed. The party might be convicted of the conspiracy before the felony was committed, and could the felony then merge the prior offence? It is submitted, therefore, that the defendants were properly convicted of the conspiracy. The second objection is, that the indictment does not show an offence. The 17 Geo. 3, c. 56, s. 17, after reciting that journeymen dyers and apprentices and servants frequently abused the trust reposed in them, by dyeing goods for their own profit, or without the consent of their masters,

provides, that "if any person employed as a journeyman dyer, or as servant or apprentice in dyeing any felt or woollen, &c., shall, without the consent of his master, &c., wilfully dye any of the said materials, or shall without such consent wilfully receive any such materials for the purpose of dyeing the same," he shall be subject to certain penalties. It is objected, that it is not alleged that the goods were not the goods of the defendants themselves, or of Lewis; but this is an allegation of an overt act, which may be rejected altogether; but even if the goods were the goods of the defendants themselves, the defendants used them for purposes for which they had no right to use them. It is also objected that there is no duty of the defendants alleged, but this is quite unnecessary: (*Rex v. Gill*, 2 B. & Ald. 204, was cited.)

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OTHERS.
—
*Merger of
Misdemeanor.*

January 18.

Allen, Serjt., and *Huddleston*, contra.—This is an indictment for conspiracy; but the overt acts set out in the indictment show that the defendants were guilty of larceny. If those acts had been done in pursuance of their duty, it would have been embezzlement. [ERLE, J.—Each man was authorized to dye goods of his own, and the goods fraudulently dyed were represented to be their own.] That would only make the proof of the larceny more difficult; the question of fact would be whether the articles dyed were the property of the servant? If not, then it would be the case of a fraudulent appropriation by a servant of his master's property to his own use, which is larceny; it makes no difference that there was a limited permission to use the dye if the limits of that permission are overstepped. Persons who conspire to steal are accessories before the fact to felony, and therefore felons. In *Foster's Crown Law*, 126, it is said "The best writers on the Crown Law agree that persons procuring, or even consenting beforehand, are accessories before the fact." That being so, the rule is here applicable, that where on an indictment for misdemeanor the evidence necessarily proves a felony, the misdemeanor is merged in the felony. That rule applies in every case where the evidence necessary to prove the misdemeanor proves the felony; it perhaps does not apply where incidental and extraneous evidence, not necessary to prove the misdemeanor, discloses that a felony has been committed. The same state of facts must prove both the felony and the misdemeanor. In *R. v. Cross*, 1 Ld. Raym. 711, the principle that a misdemeanor merges in a felony was not questioned either at the bar or by the bench; and, indeed, in all the old cases the question appears to have been, not whether the doctrine was sound, but whether it was applicable to the particular case. The case of *Sir S. Procter v. Darnbrook* (Hob. 138) is quite in point. That was a proceeding in the Star Chamber for riot, and the court refused to entertain it, because it appeared that one hurt in the riot died within three months, and ordered an indictment for murder to be preferred. It is true that an acquittal of the felony would be no answer to a

Argument for
the prisoners.

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subsequent indictment for the misdemeanor; but that does not affect the principle; because in that case the assumption is that no felony has been committed; but the smaller offence of misdemeanor may have been committed. No question of merger arises. In Foster's Crown Law (p. 373, c. 3, s. 6 of the 3rd Discourse), it is said, "by the 3 & 4 Will. & M., and by 5 Ann., receivers of stolen goods knowingly are made accessories after the fact; and by the 4 Geo. 1, they are liable to be transported for fourteen years. Before the statute of King William, receivers, unless they likewise received and harboured the thief, were guilty of a bare misdemeanor, for which they were liable to fine and imprisonment, or other corporal punishment. But that act having made them accessories and consequently felons, the prosecuting them as for a bare misdemeanor was holden by all the judges at a conference about the latter end of King William's reign to be improper and illegal; for the misdemeanor was merged and absorbed in the crime of felony; just as felony at common law, when made high treason by statute, which hath been done in a few cases, is merged and absorbed in the treason." And *Isaac's case* (2 East, P. C. c. 21, s. 8, p. 1031), supports the same principle. It is an express decision in the point by Buller, J. In *Rex v. Story* (Rusa. & Ry. 81) it was assumed that if the prisoner's offence amounted to forgery, he could not have been convicted of the lesser offence. Hence the necessity of considering whether he had or had not committed forgery. *Rex v. Evans* (5 Car. & P. 553), was a similar case; and the prisoner was acquitted by Taunton, J., because he had obtained the goods by means of a forged request, and ought, therefore, to have been indicted for forgery. (a) So the same course was adopted for the same reason by Parke, B. and Coltman, J., in *Reg. v. Anderson* (2 Moo. & Rob. 469), although there the same argument in effect was urged as here; and it was said, "Even admitting that the prisoner has been guilty of a felony by forging this instrument, the offence for which he is now indicted is distinct. The felony is complete when the instrument is counterfeited; the misdemeanor is not committed until the money is obtained by means of it; it is a subsequent independent offence, and would not merge in the antecedent felony." It is said that the authorities in support of this doctrine are few; but the reason is that it has never been questioned. The general acknowledgment of the principle is proved by the proviso to s. 53 of 7 & 8 G. 4 c. 29 (the statute of False Pretences), which is in these words: "Provided always, that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he

(a) In Russell on Crimes (ed. Greaves), vol. 2, p. 309, it is thus laid down on the authority of the passage from Foster (p. 373), "Where the goods are obtained by a forged instrument, which falls within the class of instruments, the forging of which is made felony by statute, the indictment must be for forging the instrument, as the misdemeanor is merged in the felony."

shall not by reason thereof be entitled to be acquitted of such misdemeanor." The object of that provision being to avoid the consequences of the doctrine, for which these defendants now contend. It has been asked, upon what reason or principle does the doctrine rest? The reason mentioned in *R. v. Cross*, and the true reason is, that no man is to be harassed by frequent prosecutions for the same offence. *Nemo debet bis puniri pro uno delicto*; and that might be the case unless the misdemeanor is merged in the felony; because a conviction of the misdemeanor could not be pleaded to a subsequent indictment for the felony. The reason of which, given by Hawkins (2 Pl. Cr. c. 35, s. 5; c. 36, s. 7) is, that the judgments are different. The case of a conspiracy to murder, and a murder in pursuance of the conspiracy has been suggested. That would involve four distinct offences—1st, the conspiracy: 2nd, an attempt to commit murder: 3rd, an assault: and 4th, murder; but would a conviction or acquittal of the conspiracy or the attempt or the assault be pleadable in answer to the charge of murder? Clearly not. Public policy requires that the judge should interfere to stop a prosecution for misdemeanor when the facts prove a felony. Misdemeanors may be compromised; and if the argument on the other side should be upheld, a murder might be indicted as a misdemeanor and compromised; and then the conviction afterwards pleaded in answer to a charge of murder. In civil actions the plaintiff cannot recover unless the form of his declaration is strictly correct; because judgment recovered in a wrong form of action could not be pleaded in answer to a subsequent action in the right form. The principle is stated in *Luttrell's case* (6 Mod. 77), which is thus shortly reported: "By Holt, C. J., at *nisi prius*, *ut audiui*, this difference was taken; if a civil action be brought, as trover for goods, after recovery, you may indict him for trespass or felony for the same taking, because the offences or causes of action are of a different nature, the one civil and the other criminal; but if the first prosecution had been criminal, as an indictment for trespass, &c., and the crime appears to be felony, then you cannot have verdict or judgment on the indictment for trespass, it being the inferior. And this he said had been adjudged in Mr. Luttrell's case." The case of *Reg. v. Neale* (1 Den. C. C. 36; 1 Car. & K. 591), is mainly relied upon by the other side; but in the first place that case was not argued; and in the second it is distinguishable from the present. The evidence which proved the felony was not necessary to prove the misdemeanor. Something extraneous was elicited by cross-examination, after the case for the prosecution had been clearly proved; and it was only in consequence of that extraneous piece of evidence that any felony appeared to have been committed. Besides the offence there was a misdemeanor created by a particular statute, which in effect excluded the operation of the doctrine of merger. [ERLE, J.—Then do you say that the prisoner might have been convicted of the misdemeanor first and afterwards of the rape, and punished for both?] Yes; that seems to be the effect of the particular statute

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(9 Geo. 4, c. 31, ss. 16, 17.) [ERLE, J.—Is not an assault with intent to commit a rape a statutable misdemeanor? And would you say that there might be a double conviction, first, of the misdemeanor, and then of the rape?] No; because the assault is an offence at common law, and is included in the rape. When the minor offence is a necessary constituent of the larger, then the former is merged in the latter. In the present case the defendants were accessories before the fact to a felony, and therefore felons by the very same act, which is the misdemeanor charged. In *R. v. Neale*, more evidence was necessary to convict of the felony than of the misdemeanor. [PATTESON, J.—And different evidence; the age of the girl was necessary to be proved upon the indictment for misdemeanor; it would not be necessary in an indictment for the felony.] How would it be possible for the prisoner in that case, to have pleaded *autrefois convict* to a charge of rape. On the face of them the two indictments would be quite different. In the first indictment there would be no statement that the act was done against the will of the child. Upon these grounds it is submitted, that the judge at the trial ought to have directed an acquittal. Secondly, in arrest of judgment, the 3rd and 4th counts disclose no offence. 1st. They do not negative that the material dyed belonged to the defendants; and as it appears that the defendants had the right of dyeing materials belonging to themselves, that negative averment is essential. The word “fraudulently” will not help it: (*Reg. v. Peck*, 9 Ad. & Ell. 686; *R. v. Seward*, 1 Ad. & Ell. 706; 1 Burn’s Justice, 973; *Fletcher v. Calthrop*, 6 Q. B. 880; *R. v. Richardson*, 1 Moo. & Rob. 402.) [ERLE, J.—The offence charged is a conspiracy to dye materials not belonging to themselves; and it is not necessary to set out overt acts to make a valid charge of conspiracy.] Not if the charge is by itself sufficient (*King v. The Queen*, 7 Q. B. 795); but it is not sufficient here. A good charge of conspiracy must be, either to commit an illegal act or a lawful act by illegal means: (*R. v. Seward*, per Ld. Denman, C. J., 1 Ad. & E. 713.) Here there is no allegation that the means were illegal, the question therefore is, whether the act was illegal. 17 Geo. 3, c. 56, s. 17, is referred to; but that is repealed by 6 & 7 Vict. c. 40, s. 1. [ERLE, J.—Sect. 34 of that act explains the manufactures, trades, occupations, and employments, to which the act is to extend; and dyeing is not amongst them.] But s. 35 (the interpretation clause) applies the word “manufacture” to all “operations and employments connected with or incidental to the manufacture of any of the said materials, or any parts, branches, or processes thereof.” Even if the 17 Geo. 3, c. 56, s. 17, is not repealed, that section is not followed in either of the counts, for the term “wilfully” is omitted. It is said, that in the 4th count the relation of master and servant is shown; and that an implied duty arises from that relation, which sufficiently shows the act of the defendants to have been unlawful; but the particular duty ought to be distinctly stated in the indictment, to lay the foundation of the offence subsequently charged.

No indictment will lie for a conspiracy to kill game or to commit any other civil trespass (*R. v. Turner*, 13 East, 228); or for a conspiracy to sell a man an unsound horse by false warranty (*R. v. Pywell*, 1 Stark. 402); or for a conspiracy to exonerate one parish from the charge of a pauper, and to throw it on another, or for that purpose to cause a male pauper to marry a female pauper (*Rex v. Seward*, above cited); nor for a conspiracy to cheat and defraud a party of the fruits of a verdict. These cases illustrate the sort of unlawful act, which must be the object of the conspiracy. Here there may have been a contention between the master and the servants as to the extent of the permission which he had given them. Again, the statute 17 Geo. 3, c. 56, s. 17, applies only to dyers of certain particular materials; and these counts are bad for not showing that Mr. Lewis, the prosecutor, was a dyer within the act. The dye and instruments are not alleged to be the property of Lewis; nor are the defendants described as "journeymen dyers," which is the term used in the statute. The counts charge the defendants with using the dye and implements of trade of Lewis; but they do not negative that they paid him for them, nor allege that it was done with intent to defraud him. [ERLE, J.—The 3rd and 4th counts charge that the defendants were retained as the servants of Lewis; and that without his consent, and at his expense, they dyed with his dye various materials for their own profit.] The allegation that they were retained as his servants is without time or place. At the date of the conspiracy they may not have been his servants. The words "fraudulently" and "without consent," will not supply the want of positive allegations; and it is consistent with all the averments here, that they may have paid over to the master any money which they received. In *R. v. Peck*, it was expressly decided that a count which charged a conspiracy to defraud persons of their debts, and, in pursuance of that conspiracy, the execution of a false and fraudulent deed, was bad for omitting to show in what respect it was false and fraudulent. Lastly, the counts ought to have concluded *contra formam statuti*, as the word "wilfully" is omitted.

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Cur. adv. vult.

JUDGMENT.

On a subsequent day judgment was delivered by

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LORD DENMAN, C. J.—The indictment charged, that the defendants, being in the employ of the prosecutor, a dyer, conspired to use the dyeing materials on articles not entrusted to them for dyeing, and not belonging to themselves or their families, and so to defraud their employer of profit. The evidence showed that the prosecutor permitted his servants to dye any articles belonging to themselves or their families, but not things belonging to others; and that the defendants had taken in articles not belonging to themselves or their families, and had dyed them for profit with the materials of their employer, and passed them off for articles within the prosecutor's permission. Several objections to the indictment and the

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evidence were made at the trial, and in support of the rule for arresting the judgment or for a new trial, and have been disposed of; but the objection, that the misdemeanor charged formed part of a felony, and was merged therein, and that, therefore, either the judgment should be arrested, or a verdict of acquittal entered, was reserved for consideration. With respect to arresting the judgment, it is clear that the essential part of the indictment is the charge of a conspiracy; so that if the evidence proved the conspiracy, and did not prove the overt act alleged, viz. that the conspiracy was carried into effect, the indictment would have been sufficiently proved. The point, therefore, is not raised by the indictment. With respect to the evidence, we do not propose to examine the correctness of the opinion of the learned judge at the trial, that it did not prove a larceny, and that it tended rather to prove the obtaining of goods by false pretences than theft; but, assuming that the evidence to prove the conspiracy would have been sufficient to warrant a conviction, upon a charge of larceny, against principals and accessories, and that the point contended for by the defendants' counsel was raised, we have to decide whether the defendant had, therefore, a right to claim a verdict of acquittal. The main reliance was placed on *Rex v. Cross* (1 Lord Raym. 711), where the defendant was convicted of a misdemeanor, in receiving stolen goods knowing them to have been stolen; and the court decided to arrest the judgment, because the offence was a felony created by the 3 & 4 Will. & M. c. 9, s. 4, and was not indictable as a trespass; and Holt, C. J., adds, if the proceeding had been at common law, the fact charged would have been evidence that the defendant was accessory after the fact to a felony. But that case is irrelevant to the present question, which arises only in respect of felonies composed of a series of facts, where a part of the series is a complete misdemeanor. The receipt of stolen goods knowingly does not of necessity comprise any series of acts; on the contrary, that offence is not committed at all, unless the receipt and the knowledge are simultaneous; in which case, by the common law, they might be evidence of the defendant's assisting a felon, and so of being guilty of a felony as an accessory after the fact; and by the statute then in force, those facts constituted a felony. The offence was a felony, and a felony only; and, therefore, an indictment charging it to be a misdemeanor was held wrong in law. The case does not show that a criminal, who has been guilty of a complete misdemeanor, and also of a felony comprising a misdemeanor, may set up his felony as a bar to the prosecution for the misdemeanor. The case of *Procter v. Darnbrook and others* (Hob. 138), gives no support to the defendant's case, but serves to explain the principle upon which judges have acted, in the exercise of their discretion, in some cases of misdemeanor. The plaintiff was suing the defendants, in the Star Chamber, for riots, and for felling of woods; and his proof went to show, that the defendants, in the course of their riotous acts, had committed murder; and the judges think it fit that the plaintiff should prefer a bill for murder to the grand inquest,

and adjourn the further hearing of the plaintiff's suit for the riots till the question of murder should be disposed of by the proper tribunal. The jurisdiction, here exercised, by the judges of the Star Chamber, is exercised now by the justices of oyer and terminer, who may direct one indictment to be quashed or suspended, and another preferred, as public justice may require. But the court, by making the plaintiff prosecute for the felony before he went on with his suit, gave no sanction to the notion that the defendant has any right so to interfere, and to demand an acquittal for a manifest minor offence, upon the pretext that he has a right to direct himself to be prosecuted for a graver crime. The passage cited from Foster, Discourse iii., c. 3, s. 6, relates solely to the offence of knowingly receiving stolen goods; and the observations above made upon *Rex v. Cross* (1 Lord Raym. 711), apply equally to show this passage to be irrelevant here. In *Isaac's case* (2 East, P. C. c. 21, s. 8), the prisoner was indicted for the misdemeanor of setting fire to his own house, whereby adjoining houses were in danger of being burnt; the evidence was, that he had set fire to his own house to defraud the insurance company, and that the adjoining houses had been burnt down. The judge directed an acquittal for the misdemeanor, stating, that, upon these facts, the prisoner was guilty, if at all, of felony. By the law at that time the mere setting fire by a man to his own house was no offence; but, if his house was so situate that other houses were endangered, it was a misdemeanor, being in the nature of an attempt to set them on fire. If they were burnt, it was a felony; it was a setting fire to them, every man being taken to intend the obvious consequences of his act: (see the cases in 2 East, P. C. c. 21, s. 7.) The learned judge who directed the acquittal may have considered that the crime of arson consists in the one act of setting fire unlawfully; and that, after the fire has been so set, the party is responsible for its progress until it is extinguished, and that the progress decides whether such setting on fire is a felony or a misdemeanor; and that a prisoner who has committed a felony, and no other offence, cannot properly be charged with the misdemeanor of an attempt to commit it; and also he may have considered that public justice required a more signal example in a case of such guilt. On both or either of these grounds, the case is distinguished from the present. In *Rex v. Evans* (5 C. & P. 553), and *Reg. v. Anderson* (2 M. & Rob. 469), the misdemeanor of obtaining goods by false pretences was charged, and the evidence showed the false pretence to be a felony, namely, the uttering of a forged instrument. In the first case the judge, in the last the prisoner, objected, that as the evidence thus showed a felony to have been committed, therefore the charge of misdemeanor failed; and two judges supported the prisoner's objection, declaring that the proper way of proceeding was by indictment for felony. It is clear, that if a misdemeanor is by statute made a felony, the indictment ought to be for felony, and these cases may have been taken to come within this rule, the first step in the misdemeanor charged

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being created a felony, and, if so, they are here irrelevant. But, it should be observed, that the misdemeanor of obtaining goods by false pretences consists of a series of acts—the false pretence and the obtaining of the goods—and that the first step in the series may also be a felony. Where that is the case, there appears no reason why the prisoner should be allowed to defeat the charge of the lesser offence, by alleging his own guilt in respect of the greater offence. The same act may be part of several offences; the same blow may be the subject of inquiry in consecutive charges of murder and robbery. The acquittal on the first charge is no bar to a second inquiry, where both are two charges of felony; neither ought it to be where the one charge is of felony and the other of misdemeanor. These being the authorities cited for the defendants, there appear none directly in their favour; and there is a decision against them. In *Reg. v. Neale* (Den. C. C. R. 36; 1 C. & K. 591), where a charge of misdemeanor, in having intercourse with a female child between the age of ten and twelve, was held proved, and the conviction maintained by the judges, although the evidence showed that the very act charged as misdemeanor was also the felony of rape; the argument for the prosecution being, that every material allegation of the indictment was proved, and that the verdict ought to be according to truth. This is a direct adjudication that a misdemeanor, which is part of a felony, may be prosecuted as a misdemeanor, though the felony has been completed; and the attempt, on the argument, to make a distinction between misdemeanors by statute and those by common law, was not successful, as the incidents to a misdemeanor are not affected by the origin in law from whence it was obtained. It was further urged for the defendants, that, unless this defence was sustained, they might be twice punished for the same offence. But this is not so; the two offences being different in the eye of the law. If, however, a prosecution for a larceny should occur after a conviction for a conspiracy, it would be the duty of the court to apportion the sentence for the felony with reference to such former conviction. If the position contended for by the defendants was true, its application would be subject to much uncertainty; for it is not within the province of the judge, in general, to decide on the credibility of the witnesses, or the weight of the facts tending to prove a felony; but according to the present contention, the duty of acquitting, on his own opinion, is cast upon him; and this conclusion of fact, in which probably the jury would not have concurred, is to be subject to no review. Also, if he should be satisfied that a felony is proved, and should direct an acquittal of the misdemeanor, it is obviously uncertain whether the same evidence would be given upon a prosecution for felony, or would be satisfactory to the jury, or would be left without answer. The felony may be pretended to extinguish the misdemeanor, and then may be shown to be but a false pretence; and entire impunity has sometimes been obtained, by varying the description of the offence according to the prisoner's interest; and he has been liberated on both charges

solely because he was guilty upon both. Upon this review, we are of opinion that this conviction for a misdemeanor ought to be sustained, although the evidence proving it proved also that it was part of a felony, and that such felony had been completed.

Rule discharged.

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CROWN CASE RESERVED.

January 20, 1849.

(Coram LORD DENMAN, C. J.; PARKE, B.; ALDERSON, B.;
COLERIDGE, J.; and COLTMAN, J.)

REG. v. HOLLOWAY. (a)

Larceny by servant.—Removal of master's goods.—Animus furandi.

A person employed in a tannery got clandestine access to a warehouse, which was part of the tannery, and in which dressed skins were kept, and took from it certain skins dressed by other workmen. They were afterwards seen and recognized at the porch or place in which he worked, and he was indicted for the larceny of them. The jury found that he had not intended to remove the skins from the tannery and dispose of them elsewhere, but that his intention in taking them was, to deliver them to the foreman and to get paid for them as if they were his own work, and that in this way he intended the skins to be restored to the possession of his master.

Held, that he was not guilty of larceny.

CASE.

THE prisoner, William Holloway, was indicted at the General Quarter Sessions, holden in and for the borough of Liverpool, on December 4th, 1848, for stealing within the jurisdiction of the court, 120 skins of leather, the property of Thomas Barton and another.

Thomas Barton and another were tanners, and the prisoner was one of many workmen employed by them at their tannery, in Liverpool, to dress skins of leather. Skins when dressed were delivered to the foreman, and every workman was paid in proportion to, and on account of the work done by himself. The skins of leather were afterwards stored in a warehouse adjoining to the workshop. The prisoner, by opening a window and removing an iron bar, got access clandestinely to the warehouse, and carried away the skins of leather mentioned in the indictment, and which had been dressed by other workmen. The prisoner did not remove these skins from the tannery; but they were seen and recognized the following day at the porch or place where he usually worked in the workshop. It was proved to be a common

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(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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practice at the tannery for one workman to lend work, that is to say, skins of leather dressed by him, to another workman, and for the borrower in such case to deliver the work to the foreman, and get paid for it on his own account, and as if it were his own work.

A question of fact arose as to the intention of the prisoner in taking the skins from the warehouse. The jury found that the prisoner did not intend to remove the skins from the tannery and dispose of them elsewhere, but that his intention in taking them was to deliver them to the foreman and to get paid for them as if they were his own work; and in this way he intended the skins to be restored to the possession of his masters.

The jury under direction of the court found the prisoner guilty, and a point of law raised on behalf of the prisoner was reserved, and is now submitted for the consideration of the justices of either Bench and barons of the Exchequer.

"The question is, whether on the finding of the jury, the prisoner ought to have been convicted of larceny?"

"Judgment was postponed, and the prisoner was liberated on bail taken for his appearance at the next or some subsequent Court of Quarter Sessions to receive judgment, or some final order of the court."

Argument for
the Crown.

Lowndes, in support of the conviction.—The finding of the jury shows that the prisoner committed larceny.

PARKE, B.—Is not this case governed by *R. v. Webb* (1 Moo. C. C. 431)?

Lowndes.—The cases are distinguishable. In that case, miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, removed from the heaps of other miners ore produced by them, and added it to their own heaps, the ore still remaining in the possession of the master; and it was held not to be a larceny. Here the skins were removed from the place in which they had been put by the master for custody, into a place in which they were in fact in the prisoner's custody. In *R. v. Webb*, the ore was never out of the master's custody; in this case, the skins were distinctly out of the master's custody.

COLERIDGE, J.—In the case of *R. v. Webb* there was the interval in which the ore passed from one heap to the other; was it not then out of the master's custody?

Lowndes.—There was no intent to injure the owner in that case.

COLERIDGE, J.—There was the intent to obtain payment for ore which the miner had not dug from the earth.

PARKE, B.—It is essential that the taking should be with the intent to deprive the owner of the property in the thing taken; the jury did not find that in this case, but only that the intention of the prisoner was to get paid for the skins as if they had been his own work.

Lowndes.—It is not necessary that there should be the intention wholly to deprive the owner of the property; it is enough if the

chattel is taken for the purpose of getting a benefit different from the mere use of it. In this case though there was an intention to return the skins, there was not the intention that the owner should be put into the situation in which he was before the taking; for though he was to have the skins, he was to have them minus the wages.

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PARKE, B.—The taking must be with intent to acquire the entire dominion to the taker.

Lovndes.—The taking must be treacherous,—for evil gain.

PARKE, B.—East's definition is, "The wrongful or fraudulent taking or carrying away by any person of the mere personal goods of another person anywhere, with a felonious intent to convert them to his (the taker's) own use and make them his property, without the consent of the owner." (2 East, Pl. Cr. 553.)

Lovndes.—In 3 Inst. 107, Lord Coke defines larceny to be "the felonious and fraudulent taking and carrying away, by any man or woman, of the mere personal goods of another, neither from the person, nor by night in the house of the owner." Bracton and Fleta describe it as "Contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino, cujus res illa fuerat." (Bracton (lib. iii., c. 32, fol. 150); Fleta, (lib. i., c. 36); Glanville (lib. vii., c. 17; lib. x., c. 15), follows Bracton). The *Mirror* gives the word "treachereusement;" that is, without a *bonâ fide* claim. In 4 Blackst. Com. 232, it is said that the taking must be "felonious; that is, done *animo furandi*; or as the civil law expresses it, *lucri causâ*." Blackstone, therefore, uses these phrases as synonymous. Argument for
the Crown.

LORD DENMAN, C. J.—Suppose a man takes the horse of another with intent to keep him for a year, ride him through all the counties of England, and then return him: is that a larceny?

PARKE, B.—There must be an intention in the taker to acquire the whole dominion over the thing, to make it his own; to do what he likes with it.

Lovndes.—The facts in this case show a taking *lucri causâ*.

PARKE, B.—The case of *R. v. Webb* has decided otherwise.

ALDERSON, B.—This is rather an obtaining money by false pretences than a larceny.

Lovndes.—If this is not a larceny it would follow that if chattels were taken for the purpose of obtaining money for them by false pretences from the owner, and in that way converted to the use of the taker, he would not commit larceny. If the statement does not sufficiently show what offence has been committed, the case may be restated.

LORD DENMAN, C. J.—No. The facts on which we are to decide must be stated at once. This court is not to be used to keep these cases alive.

ALDERSON, B.—This will not prevent you from bringing an indictment for obtaining money under false pretences.

Lovndes.—No money was obtained.

ALDERSON, B.—The attempt to commit a misdemeanor is a

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misdemeanor; and if the removal of the skins amounted to such an attempt, the indictment may be preferred. The only question here is, whether the recorder ought to have directed the jury to find a verdict of not guilty.

Judgment.

LORD DENMAN, C. J.—If I thought the question was open after the authorities, I must say that a great deal might be urged in support of the proposition, that these facts show a larceny to have been committed; because the owner is deprived of his property for some time, and the probability is that the intent distinguishing the case from larceny may be altered. The case which I put, of borrowing a horse for a year, without the owner's consent, with intent to ride it through England and then return it, shows this. But if we say that borrowing alone would constitute larceny, we are met by similar cases the other way. With regard to the definition of larceny, we have of late years said that there must be an intention to deprive the owner permanently of his property, which was not the intention in this case. We are not disposed to encourage nice distinctions in the criminal law, yet it is an odd sort of excuse to say to the owner, "I did intend to cheat you in fact, and to cheat my fellow workmen afterwards." This, however, is not an act which is not punishable; for if it is not a misdemeanor, which at the first sight it appears to be, it is an act done towards committing that misdemeanor. We must abide by former decisions, and hold that a conviction for larceny cannot in this case be supported.

PARKE, B.—I am of the same opinion. We are bound by the authorities to say that this is not larceny. There is no clear definition of larceny applicable to every case; but the definitions that have been given, as explained by subsequent decisions, are sufficient for this case. The definition in East's Pleas of the Crown is on the whole the best; but it requires explanation, for what is the meaning of the phrase "wrongful and fraudulent?" It probably means "without claim of right." All the cases, however, show that, if the intent was not at the moment of taking to usurp the entire dominion over the property, and make it the taker's own, there was no larceny. If, therefore, a man takes the horse of another with intent to ride it to a distance, and not return it, but quit possession of it, he is not guilty of larceny. So in *R. v. Webb*, in which the intent was to get a higher reward for work from the owner of the property. If the intent must be to usurp the entire dominion over the property, and to deprive the owner wholly of it, I think that that essential part of the offence is not found in this case.

ALDERSON, B.—I cannot distinguish this case from *R. v. Webb*.
COLERIDGE, J., concurred.

COLTMAN, J.—We must not look so much to definitions, which it is impossible *à priori* so to frame that they shall include every case, as to the cases in which the ingredients that are necessary to constitute the offence are stated. If we look at the cases which have been decided, we shall find that in this case one necessary ingredient, the intent to deprive entirely and permanently, is wanting.

Conviction reversed.

CROWN CASE RESERVED.

January 20th, 1849.(Coram LORD DENMAN, C. J.; PARKE, B.; ALDERSON, B.;
COLERIDGE, J.; and COLTMAN, J.)

REG. v. HALL. (a)

*Larceny by servant.**The servant of a tallow-chandler removed fat belonging to his master from the room in which it was kept, to a room where his master was accustomed to buy fat from persons who had it to sell, and placed it on a pair of scales there, with intent to sell it to his master, and appropriate the proceeds to his own use.**Held, to be larceny in the servant.*

THE following case was reserved by the Recorder of Hull:—
John Hall was tried at the last Epiphany Quarter Sessions for the borough of Hull on an indictment charging him with stealing fat and tallow, the property of John Atkin.

John Atkin, the prosecutor, is a tallow-chandler, and the prisoner at the time of the alleged offence was a servant in his employment. On the morning of the 6th of December last, the prosecutor, in consequence of something that had occurred to excite his suspicions, marked a quantity of butcher's fat, which was deposited in a room immediately above the candle-room in his warehouse. In the latter room was a pair of scales used in weighing the fat, which the prosecutor bought for the purposes of his trade. At noon, the foreman and the prisoner left the warehouse to go to dinner, when the former locked the doors and carried the keys to the prosecutor. At that time there was no fat in the scales. In about ten minutes, the prisoner came back and asked for the keys, which the prosecutor let him have. The prosecutor watched him into the warehouse, and saw that he took nothing in with him. In a short time he returned the keys to the prosecutor, and went away. The prosecutor then went into the candle-room, and found that all the fat which he had marked had been removed from the upper room, and after having been put into a bag, had been placed in the scales in the candle-room. The prosecutor then went into the street, and waited until a man of the name of Wilson came up, who was shortly followed by the prisoner. The latter, on being asked where the fat came from that was in the scales, said it belonged to a butcher of the name of Robinson; and Wilson, in the

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prisoner's presence, stated that he had come to weigh the fat which he had brought from Mr. Robinson's. The prosecutor told Wilson that he would not pay him for the fat until he had seen Mr. Robinson, and left the warehouse for that purpose. Wilson immediately ran away, and the prisoner, after offering, to the prosecutor's wife if he was forgiven, to tell all, ran away too, and was not apprehended until some time afterwards, at some distance from Hull.

I told the jury that if they were satisfied that the prisoner removed the fat from the upper room to the candle-room, and placed it in the scales with the intention of selling it to the prosecutor as fat belonging to Mr. Robinson, and with the intention of appropriating the proceeds to his own use, the offence amounted to larceny.

The jury found the prisoner guilty.

Argument for
the prisoner.

Dearsley for the prisoner.—There was no larceny in this case. The offence was an attempt to commit a statutable misdemeanor, and only punishable as such. The case of *R. v. Holloway*, *supra*, p. 241, decides it. There was an asportation; but no intention to dispose of the property, for it was part of the very scheme that the owner should not be deprived of his property in the fat. There must to constitute larceny, be a taking, with intention of gain, and of depriving the owner of the property for ever. The last ingredient is wanting here: (He cited *R. v. Morfit*, R. & R. 307.)

ALDERSON, B.—If a man takes my bank note from me, and then brings it to me to change, does he not commit a larceny?

Dearsley.—A bank note is a thing unknown to the common law, and therefore the case put could not be larceny at common law.

Judgment.

LORD DENMAN, C. J.—The taking is admitted. The question is, whether there was an intention to deprive the owner entirely of his property; how could he deprive the owner of it more effectually than by selling it? to whom he sells it cannot matter. The case put of the bank note would be an ingenious larceny, but no case can be more extreme than this.

PARKE, B.—In this case there is the intent to deprive the owner of the dominion over his property, for it is put into the hands of an intended vendor, who is to offer it for sale to the owner, and if the owner will not buy it, to take it away again. The case is distinguishable from that of *R. v. Holloway* by the existence of this intent, and, further, by the additional impudence of the fraud.

ALDERSON, B.—I think that he who takes property from another intends wholly to deprive him of it, if he intend that he shall get it back again under a contract by which he pays the full value for it.

COLERIDGE, J., and COLTMAN, J., concurred.

Conviction affirmed.

CENTRAL CRIMINAL COURT.

OCTOBER SESSION, 1848.

October 26.

REG. v. HARE AND REHDEN. (a)

Evidence—Larceny.

In a portmanteau not proved to belong to a prisoner on trial was found a paper folded like a letter, and containing in the inside what purported to be an inventory of goods pawned at different times. The inventory was not in the prisoner's handwriting; but on the outside of the paper the prisoner's name, and the word "private," both in his handwriting, were indorsed.

Held, that the contents of the paper were not admissible in evidence against him.

THE prisoners were indicted for stealing four shawls, and Rehden was also charged in the same indictment with receiving the same knowing them to be stolen.

Hare pleaded guilty. On the trial of Rehden it appeared that the shawls were obtained from the prosecutor by Hare, on the pretence that he could get a customer for them, but immediately on getting possession of them they were pawned by himself and others. The two prisoners lived together, and at their lodgings was found a portmanteau which Rehden said was Hare's. It contained a great number of duplicates, some in the name of each prisoner; and among them were the duplicates of the shawls, but in the name of neither. The prosecutor's invoice was found in the same portmanteau, and there was also a paper folded up in the shape of a letter, and indorsed on the outside "*J. Rehden, private,*" which was proved to be in the prisoner, Rehden's, handwriting. Inside the paper was an inventory of goods pawned, with dates, names, &c.; but this was not in Rehden's handwriting.

Ballantine (for the prisoners) contended that the inventory could not be read as against Rehden; he had not written it, he might never have seen it, and the indorsement, which was proved to be his, made no difference, since it might have been made long before the inventory was written. There was nothing in fact to connect the inside with the outside. A piece of paper which happened to have the outer words upon it, might have been taken up casually by whomsoever made the inventory, and the list then made out.

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AND
REHDEN.
—
Evidence.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

R. v. HARR
AND
REHDE.
—
Evidence.

Clarkson (for the prosecution) submitted that the paper bearing the prisoner's indorsement, was at least admissible as evidence. Its value as tending to prove his guilt—or how far it went as proof that he knew what the paper contained—was a question for the jury.

The COMMON SERJEANT (after consulting Maule, J. and Wightman, J.)—I have consulted both the learned judges on this point; they have given every attention to it, and upon the whole they think it better not to admit the evidence. And I think on good reason; for *non constat* that the words "private," and the prisoner's name may not have been written previously to the writing on the other side. Mr. J. Wightman was strongly of opinion from the first that it was not receivable. Mr. J. Maule was at first in some doubt, but afterwards thought it better that the paper should not be given in evidence.

CENTRAL CRIMINAL COURT.

APRIL SESSION, 1848.(a)

April 7.

REG. v. ORCHARD AND THURTL. (b)

Indecent exposure—Indictment.

An indictment charged two defendants with indecent exposure of their persons in an open and public place.

Held, that an urinal with boxes or divisions for the convenience of the public, and situated in an open market, was not a public place within the meaning of the allegation.

An indictment alleged that A. "in a certain open and public place did lay his hands on the person and private parts of B. with intent to stir up in his own and B.'s mind unnatural and sodomitical desires and inclinations, and to incite B. to the committing and perpetrating with A. divers unnatural and sodomitical acts, and that B. in the said open and public place, did permit and suffer the said A. to lay his hands, &c., with the like intent."

Held, bad, as not stating any offence with legal certainty.

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STATES—That James Orchard, late of London, labourer, and James Thurtle, late of London, labourer, being persons of depraved, wicked, filthy, lewd, and beastly minds and dispositions, heretofore, to wit, on the 17th day of February, in the eleventh year of the reign of our Sovereign Lady Victoria, by the grace of

(a) This case has been unavoidably postponed.

(b) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, with force and arms, at the parish of St. Andrew, Holborn, in the ward of Farringdon-without, in London aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did meet, and were together in a certain open and public place called Farringdon-market, there situate, with the intent and for the purpose of committing and perpetrating with each other divers filthy, wicked, lewd, beastly, unnatural, and sodomitical acts and practices; to the great displeasure of Almighty God; to the great scandal and subversion of decency, morality, and good manners; to the evil example of all other persons, and against the peace of our said lady the Queen, her crown and dignity.

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THURTLE.
—
*Indecent
exposure.*

Indictment.
1st count.

Second Count.—That the said James Orchard and James Thurtle being persons of such depraved, wicked, filthy, lewd, and beastly minds and dispositions as aforesaid, afterwards, to wit, on the same day and year aforesaid, with force and arms, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said court, in a certain open and public place called Farringdon-market, there situate, unlawfully, wickedly, deliberately, and wilfully did exhibit and expose their persons and private parts to each other in indecent postures and situations, with intent then and there to stir up and excite in their own minds, and in the minds of each other, filthy, wicked, lewd, beastly, unnatural, and sodomitical desires and inclinations, and to incite and move each other to the committing and perpetrating with each other of divers filthy, wicked, lewd, beastly, unnatural, and sodomitical acts and practices, to the great displeasure of Almighty God; to the great scandal and subversion of decency, morality, and good manners; to the evil example of all other persons, and against the peace of our said lady the Queen, her crown and dignity.

2nd count.

Third Count.—That the said James Orchard, being a person of such depraved, wicked, filthy, lewd, and beastly mind and disposition as aforesaid, afterwards, to wit, on the same day and year aforesaid, with force and arms, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said court, in a certain open and public place called Farringdon-market, there situate, unlawfully, wickedly, deliberately, and wilfully did exhibit and expose his person and private parts to the said James Thurtle, and unlawfully and wickedly did lay his hands on the person and private parts of the said James Thurtle, with intent then and there to stir up and excite in his own mind and in the mind of the said James Thurtle, filthy, wicked, lewd, beastly, unnatural, and sodomitical desires and inclinations, and to incite and move the said James Thurtle to the committing and perpetrating with him, the said James Orchard, of divers filthy, wicked, lewd, beastly, unnatural and sodomitical acts and practices, and that the said James Thurtle then and there, to wit, on the same day and year aforesaid, with force and arms at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said court, in

3rd count.

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Indictment.

4th count.

the said open and public place called Farringdon-market, there situate, unlawfully and wickedly did permit and suffer the said James Orchard, so to lay his hands on the person and private parts of him, the said James Thurtle, as in this count aforesaid, and was then and there consenting to, aiding and assisting the said James Orchard in the doing and committing of the several acts and premises in this count aforesaid, in manner and form, and with the intent last aforesaid; to the great displeasure of Almighty God; to the evil example of all other persons, and against the peace of our said lady the Queen, her crown and dignity.

Fourth Count.—That the said James Thurtle being a person of such depraved, wicked, filthy, lewd, and beastly mind and disposition as aforesaid, afterwards to wit, on the same day and year aforesaid, with force and arms, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said court, in a certain open and public place called Farringdon-market, there situate, unlawfully and wickedly, deliberately, and wilfully did exhibit and expose his person and private parts to the said James Orchard, and unlawfully and wickedly, deliberately and wilfully did lay his hands on the person and private parts of the said James Orchard, with intent then and there to stir up and excite in his own mind, and in the mind of the said James Orchard, filthy, wicked, lewd, beastly, unnatural and sodomitical desires and inclinations, and to incite and move the said James Orchard to the committing and perpetrating with him, the said James Thurtle, of divers filthy, wicked, lewd, beastly, unnatural and sodomitical acts and practices, and that the said James Orchard then and there, to wit, on the same day and year aforesaid, with force and arms, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said court, in the said open and public place called Farringdon-market, there situate, unlawfully and wickedly did permit and suffer the said James Thurtle so to lay his hands on the person and private parts of him the said James Orchard, as in this count aforesaid, and was then and there consenting to, aiding and assisting the said James Thurtle in the doing and committing of the several acts and premises in this count aforesaid, in manner and form, and with the intent last aforesaid, to the great displeasure of Almighty God; to the great scandal and subversion of decency, morality, and good manners; to the evil example of all other persons, and against the peace of our said lady the Queen, her crown and dignity.

The place where this transaction occurred was proved to be in Farringdon-market. It was an enclosure formed of Portland stone, with divisions or boxes like the urinals at railway stations. It was open to the public for certain proper purposes, but otherwise enclosed. There was an aperture in the stone work to enable persons to look through and watch the proceedings of those inside.

Clarkson and Ballantine (for the defendants) contended, that the indictment was not supported by the evidence, and that the indictment was not sufficient in itself. It is not enough to say that the parties committed the act in a public and open place, but it

must be laid to have been within sight of Her Majesty's subjects: (*R. v. Watson*, 2 Cox's Crim. Cas. 376.) There, an indictment which charged the defendant with having indecently exposed himself in a certain public and open place in the presence of one person only could not be sustained. A place accessible to the public was a very different thing from an open and public place. The first count is bad for want of certainty on the authority of *R. v. Rowed* (3 Q. B. Rep. 180); and the other counts do not carry the case further. They allege certain acts done, but done with an intent to commit no specific crime.

Ryland (with him *Laurie*), for the prosecution.—If the place be so constructed that the passers by can see what takes place within, it is sufficiently public.

CRESSWELL, J.—Suppose it to be an enclosed stall in a market.

Ryland.—The public generally would not have a right as a matter of course to go in there. Here the place is entirely open to such of the public as choose to enter it. The market is public, the enclosure within it is so also; and it cannot be urged by those who took the risk of having their conduct witnessed by several persons that the place was not a public place for the purposes of this indictment. As to the case *R. v. Watson*, there only one individual was alleged to have seen the act done.

CRESSWELL, J.—And here there is an exposure of one of the parties charged to the other.

Ryland.—But the indictment goes further; it alleges that one laid his hands on the person of the other, &c., and that the other submitted, &c.

CRESSWELL, J.—Here you say he did a certain act tending to something else, which something else ought to be described. In *R. v. Rowed*, the meeting for the purposes there generally set out was held not sufficient. You do not rely on the act itself as the offence; it is the intent with which it was done; then the intent is very much in the same terms as that alleged in *R. v. Rowed*, which was held defective.

Ryland.—In that case no act was stated to have been done. It was merely alleged that the parties met for the purpose of doing certain things, describing them generally. Here it is stated that certain acts were done, which we rely on as evidence of an attempt to commit a felony.

CRESSWELL, J.—Although the place in question is in Farringdon-market, it is not a public place for the purpose of this indictment. Every man must expose his person who goes there for a proper purpose. *R. v. Watson* decides that the exposure to one person is not sufficient. Then the acts relied on here are not sufficient of themselves to constitute an offence, and that offence, which, it is alleged, they were an incitement to commit, is not described in sufficiently legal language. An incitement to commit a felony described in proper terms would be a very different charge from the present one.

ERLE, J., concurred.

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—
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exposure.*

COURT OF QUEEN'S BENCH.

January 26, 1849.

DRURY AND OTHERS v. THE QUEEN.

Reversal of judgment upon indictment—Sending back the record—
 11 & 12 Vict. c. 78, s. 5.

The recent statute 11 & 12 Vict. c. 78, s. 5, does not apply to cases which occurred before it came into operation, so as to authorize the court, upon the reversal of an erroneous judgment pronounced upon an indictment before the statute passed, to send back the record that the proper judgment may be passed.

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*Stat. 11 & 12
 Vict. c. 78, s. 5.*

Argument for
 the Crown.

ERROR upon a judgment of transportation for ten years pronounced at a Court of Oyer and Terminer and General Gaol Delivery, held at York, upon an indictment for breaking machinery, under 7 & 8 Geo. 4, c. 30, s. 4.

Bliss for the plaintiff in error.

Hall for the Crown.—It must be admitted that the sentence passed was erroneous; the section of the act of Parliament only authorizes transportation for seven years; and the judgment therefore must be reversed. The question is, what is to be done with the prisoners; and it is submitted that the court ought to pronounce the proper sentence or to send back the record to the court below, in order that that court may pronounce it. That is the effect of the new stat. 11 & 12 Vict. c. 78, s. 5; which enacts "that whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition, in any criminal case, and the court of error shall reverse the judgment, it shall be competent for such court of error either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition." It is true that the sentence in the present case was passed before that statute came into operation; and that since the time of Lord Coke (*a*) there have been several cases, in which it was held that this could not be done (*Rex v. Ellis*, 5 B. & C. 395; *Rex v. Bourne*, 7 Ad. & Ell. 58), but that upon the reversal of the judgment the defendants must be discharged; but the effect of the recent statute is to destroy the authority of those cases, which are now no longer binding on the court; for the statute professes to give the court no new power; but implies that the law was before

(a) See 3 Inst. 210.

the statute different from what it was supposed to be. [COLERIDGE, J.—Then you say that in this respect the statute is only declaratory.] Yes; if it altered the law, this case would not be within it, because the sentence was passed before it came into operation. [COLERIDGE, J.—The words are “it shall be competent” for the court to pronounce the proper judgment or to remit to the court below. Surely they are sufficient to give a new power.] The meaning is, that the court may now either pronounce the proper judgment or remit the record, whereas, before the statute the court could only remit the record. Therefore, perhaps, the court cannot in this case pass the proper sentence; but it may remit the record to the court below. The statute implies that a judgment for the plaintiff in error upon an indictment reverses the judgment only, if, as in the present case, the proceedings previous to judgment are valid. In that way it is that the statute overrules the authority of Lord Coke, and the decisions founded upon it, for Lord Coke thought that, not only the judgment, but “all former proceedings” should be reversed. That now appears to have been erroneous: and the court can no longer act upon it. They will therefore remit this record, that the proper sentence may be passed.

LORD DENMAN, C. J.—We cannot come to that conclusion in the face of so many authorities. Since the case of *R. v. Ellis*, this question has been quite settled, and the judgment therefore in this case will be reversed; and as to this judgment the prisoners must be discharged.

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Argument for
the Crown.

Judgment reversed.

EXCHEQUER CHAMBER.

February 7, 1849.(Coram PARKE, B., COLTMAN, J., ROLFE, B., CRESSWELL, J.,
and V. WILLIAMS, J.)

RYALLS v. THE QUEEN. (a)

Perjury—Indictment—Materiality of dates laid under videlicet—Jurisdiction of judges—Taxation of attorney's bill—Misdemeanor—Nomen collectivum.

An indictment for perjury committed in an affidavit sworn in answer to an application by an attorney for taxation of his bill of costs averred that the application of the attorney was made after the expiration of "one month" from the delivery of the bill of costs—the dates of the application and of the delivery of the bill were laid under a videlicet; but if taken to be correct, they showed that more than a calendar month had elapsed between the delivery of the bill and the application.

Held, that (assuming month to mean lunar month, and that the judge would have no jurisdiction unless a calendar month had elapsed) in order to support the indictment the videlicet must be rejected, and the dates assumed to be correct.

But, semble, that the jurisdiction of the judge to issue the summons sufficiently appeared, without showing that a calendar month had elapsed.

"Misdemeanor" is nomen collectivum; and therefore where an indictment contained several counts, and the venue was to try "whether the said R. be guilty of the perjury and misdemeanor aforesaid or not guilty;" and the verdict was "guilty of the perjury and misdemeanor aforesaid, in manner and form as by the said indictment is supposed against him."

Held, that they applied to all the counts, and that a general judgment of imprisonment was good.

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Perjury.

ERROR from the Queen's Bench, upon a judgment pronounced upon a writ of error brought to that court upon the following record:—

Yorkshire, to wit:—Be it remembered, that at the Special General Session of Gaol Delivery and Oyer and Terminer, holden at York, &c., on Saturday the 6th day of December, in the 9th year of the reign of Queen Victoria, &c., by the oath of, &c., it is presented that one William Unwin, after the passing of a certain act of Parliament, &c. (6 & 7 Vict. c. 73), and before and at the time of the committing of the offence hereinafter mentioned, was an attorney practising in England, and was duly admitted and practising as

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

such attorney in Her Majesty's Court of Exchequer at Westminster, and had done and transacted business as such attorney in Her said Majesty's Court of Exchequer for and on behalf of J. N. Ryalls, late of, &c., and of J. Ironsides, and on the retainer, and at the request of the said J. N. Ryalls; and the said J. N. R. and J. I. then and there became and were indebted in a large sum of money to the said W. Unwin, for fees, charges, and disbursements for the business so done and transacted for the said J. N. Ryalls and the said J. Ironsides, by the said W. Unwin as aforesaid, and the said W. Unwin afterwards and before the committing of the said offence hereinafter mentioned, to wit, on the 7th day of August, A.D. 1844, so being such attorney as aforesaid, did deliver to the said J. N. Ryalls and the said J. Ironsides (they the said J. N. Ryalls and the said J. Ironsides, then and there being the parties to be charged therewith), a bill for the fees, charges, and disbursements for the said business so done and transacted by the said W. Unwin, as such attorney as aforesaid, which said bill was then and there subscribed with the proper handwriting of him the said W. Unwin, so being such attorney as aforesaid; and that no application was made to the said Court of Exchequer, so being the court in which the said business was so done and transacted as aforesaid, or to any judge thereof, or to any court or judge whatever, by the said J. N. Ryalls and the said J. Ironsides, so being the parties charged by the said bill, or by either of them, within one month after the said delivery of the said bill, nor did the Court of Exchequer, &c., within one month, &c., refer the said bill and the demand of the said W. Unwin as such attorney as aforesaid thereupon, to be taxed by the proper or any officer of the said Court of Exchequer, or any other court. And by the jurors aforesaid upon their oath aforesaid, it is further presented, that afterwards and after the expiration of one month after the delivery of the said bill as aforesaid, and before the committing of the said offence hereinafter mentioned, to wit, on the 25th day of April, A.D. 1845, at, &c., the said W. Unwin so being such attorney as aforesaid (the said bill then and there remaining due, unpaid, and unsatisfied, to him the said W. Unwin), did make application to Sir R. M. Rolfe, Knt., then and there being one of the judges of the said Court of Exchequer, in which the said business was so done and transacted by the said W. Unwin as aforesaid, in the matter of him the said W. Unwin to refer the said bill so delivered as aforesaid, and the demand of him the said W. Unwin thereupon, to be taxed and settled by the proper officer of the said Court of Exchequer. And thereupon afterwards, to wit, on, &c., at, &c., the said Sir R. M. Rolfe, so being the judge of the said Court of Exchequer as aforesaid, issued a summons in the matter of the said W. Unwin, requiring the said J. Ironsides, and the said J. N. Ryalls, or their attorney or agent, to attend the said Sir R. M. Rolfe, at his chambers in Rolls-gardens, on, &c., to show cause why (amongst other things) the said W. Unwin's bill of costs in the causes and matters delivered to the said J. Ironsides,

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and J. N. Ryalls should not be referred to the Master of the said Court of Exchequer, to be taxed (the said bill of costs in the said summons mentioned, then and there being the said bill for the fees, charges, and disbursements for the said business so done and transacted by the said W. Unwin, as such attorney as aforesaid, and so delivered by the said W. Unwin as aforesaid.)

Indictment.

And by the jurors aforesaid, upon their oath aforesaid, it is further presented that the said J. N. Ryalls, afterwards and before the time appointed for showing cause, and before showing cause against the said application, and the said matter mentioned in the said summons, to wit, on, &c., at, &c., came before H. W., then and there being a commissioner duly authorized and appointed to take and receive affidavits touching and concerning matters depending in the said Court of Exchequer, and touching and concerning the matter of the said W. Unwin, in the said summons mentioned; and it then and there became and was material in showing cause why the said bill of costs, in the said summons mentioned, should not be referred to the said Master to be taxed as in the summons mentioned, to ascertain whether the said J. N. Ryalls did retain or employ, or otherwise authorize the said W. Unwin, to act as attorney for him the said J. N. Ryalls, and the said J. Ironsides, or for either of them, in or about the business mentioned in the said bill of costs of the said W. Unwin, in the said summons mentioned, or in or about any part of such business, and whether the said J. N. Ryalls had ever retained or employed the said W. Unwin to act as attorney or agent for him the said J. N. Ryalls. And the said J. N. Ryalls so having come, and being before the said H. W., so being such commissioner so authorized and appointed as aforesaid, then and there produced a certain affidavit, in writing, of him the said J. N. Ryalls, in the matter of the said W. Unwin, in the said Court of Exchequer, and then and there before the said H. W. in due form of law was sworn and took his corporal oath upon the Holy Gospel of God, concerning the truth of the matters contained in the said affidavit (he the said H. W. then and there having a lawful and competent power and authority to administer the said oath to the said J. N. Ryalls in that behalf); and that the said J. N. Ryalls, not having the fear of God before his eyes, but intending to cheat and defraud the said W. Unwin of the said fees, charges, and disbursements, then and there, upon his oath aforesaid, before the said H. W. (he the said H. W., then and there having a lawful and competent power and authority to administer the said oath to the said J. N. Ryalls in that behalf), falsely, corruptly, knowingly, wilfully, and maliciously, in and by his said affidavit in writing in the matter of the said W. Unwin, in the said Court of Exchequer, did depose and swear (amongst other things) in substance and to the effect following, that is to say, that he, the said J. N. Ryalls referred to in the summons of the Honourable Baron Rolfe in that matter (meaning the summons of Sir R. M. Rolfe, Knt., in the said matter of the said W. Unwin, above-mentioned), did not retain or employ the

said W. Unwin (meaning the said W. Unwin) to act as attorney for him (meaning the said J. N. Ryalls), and J. Ironsides, (meaning the said J. Ironsides), also mentioned and referred to in the said summons, or for either of them, in and about the business mentioned in the said W. Unwin's bill of costs, delivered to him the said J. N. Ryalls and the said J. Ironsides (meaning the said bill of costs in the said summons mentioned, and the bill so delivered by the said W. Unwin to the said J. N. Ryalls and the said J. Ironsides, as aforesaid), or in or about any part of such business; and he the said J. N. Ryalls never retained or employed the said W. Unwin to act as attorney or agent for him the said J. N. Ryalls, in any cause or matter whatever, as in and by the said affidavit of the said J. N. Ryalls, in the matter of the said W. Unwin, more fully and at large appears: whereas, in truth and in fact, the said J. N. Ryalls did, to wit, on, &c., at, &c., retain and employ, and authorize the said W. Unwin, to act as attorney for him the said J. N. Ryalls and J. Ironsides, in and about the business mentioned in the said W. Unwin's bill of costs, so delivered to the said J. N. Ryalls and the said J. Ironsides, as aforesaid, and in and about every part of such business; and whereas, in truth and in fact, the said J. N. Ryalls had, to wit, on, &c., at, &c., retained and employed the said W. Unwin to act as attorney and agent for him the said J. N. Ryalls, in the said business in the said Court of Exchequer as aforesaid. And so the jurors aforesaid, upon their oath aforesaid, did say that the said J. N. Ryalls, on, &c., at, &c., before the said H. W. (he the said H. W. then and there having such lawful and competent power and authority as aforesaid), by his own act and consent, and of his own wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly, did commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen her crown and dignity.

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The 2nd count differed from the first only in stating that the business was done on the retainer of J. N. Ryalls and J. Ironsides.

The 3rd and 4th counts were the same as the 1st and 2nd counts respectively, except that the averment, negating any application to the Court of Exchequer by the parties chargeable within a month, was omitted.

The record then proceeded to set forth a *venire* to the defendant to appear and "answer the premises" at the next gaol delivery for the county of York, and his appearance in obedience thereto. It then proceeded: "And being brought to the bar here in his proper person, and forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he saith that he is not guilty thereof, and thereof for good and evil he puts himself upon the country." It then stated a joinder by the clerk of the crown: a writ of *venire juratores* to try "whether the

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said J. N. Ryalls be guilty of the perjury and misdemeanor aforesaid, or not guilty;" a verdict that he is guilty "of the perjury and misdemeanor aforesaid, in manner and form as by the said indictment above against him is supposed;" and then the following judgment: "Whereupon all and singular the premises being seen and by the court here fully understood, it is considered by the court here that the said J. N. Ryalls be committed to the House of Correction at Wakefield, in and for the West Riding of the said county, and there imprisoned and kept to hard labour for ten calendar months."

The Court of Queen's Bench affirmed the judgment of the court below. (a)

Argument for
plaintiff in
error.

Pashley, for the plaintiff in error.—The 1st objection applies to all the counts of the indictment. They are framed under sect. 37 of 6 & 7 Vict. c. 73, which provides that "in case no such application as aforesaid"—that is, an application by the party chargeable to refer the attorney's bill to taxation—"shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor, or the executor, &c. of the attorney or solicitor;" so that there is no jurisdiction to refer an attorney's bill to taxation upon his own application, if within "one month" from the delivery of the bill, the party chargeable has applied; and by sect. 48 "one month" is interpreted to mean one calendar month. The objection is, that "month" in the indictment means lunar month; and that, therefore, the jurisdiction of the judge over the matter is not shown. The Court of Queen's Bench appears to have conceded that it was essential to show the jurisdiction by averring that one month had elapsed without an application by the party chargeable: but held that the word *month* in the indictment must mean the same as *month* in the statute. It is that part of the judgment which cannot be sustained. There are here two conditions precedent to the jurisdiction of the judge in this matter: 1st, that one calendar month shall have elapsed since the delivery of the bill; and, 2ndly, that no application shall have been made by the party chargeable: in this case the first is not shown; and all the facts necessary to give jurisdiction must appear: (*Rex v. the Chapelwardens of Milnrow*, 5 M. & S. 248; *Reg. v. David Smith*, 7 Q. B. 543.) [CRESSWELL, J.—The statute says that the judge shall not make the order until after the expiration of one calendar month; but may he not issue his summons? The party summoned may then show for cause that the time has not expired.] The judge has no jurisdiction in the matter till the month has expired. [PARKE, B.—Are we to make this inquiry at all, with regard to the judge of a superior court?] If a statutory power is exercised, the jurisdiction must be shown upon the face of the instrument, however high the authority exercising it. It was so held even with regard to an order of the Lord Chancellor (*Brancker v. Molyneux*, 4 M. & G. 226). [PARKE, B.—But

(a) See *Ryalls v. Reg.*, ante, p. 36; 17 L. J., 92, M. C.

might not a judge of one of the superior courts, independently of the statute altogether, issue a summons to an attorney of the court, calling upon him to show cause why his bill should not be taxed?] At common law the court has no power to order taxation (a). [PARKE, B.—Even that was formerly doubted, though it is now settled, that the power to tax does not exist at common law, except after action brought upon a bill containing taxable items. Still, a bill of costs of an attorney in the Court of Exchequer is not a matter entirely out of the jurisdiction of a judge of that court. There is a case of *Calder v. Halkett* (3 Moo. Priv. Counc. Cas. 28), and a case of *Taaffe v. Downes* (*ib.* 36, a.), in which the general jurisdiction of judges of the superior courts was much considered.] It was held there that an action would not lie against a judge for an act done beyond his jurisdiction; but the question here is not whether an action would lie, but whether the plaintiff can be convicted of perjury upon an affidavit made in a matter over which the judge does not appear to have had any jurisdiction: (*Muskett v. Drummond*, 10 B. & C. 153, 161.) [CRESWELL, J.—Do judges' orders for taxation ever state the time when the bill was delivered? I think not; and if so, according to your argument, they are all bad. PARKE, B.—If the bill has been delivered more than a month, and no application has been made by the party *chargeable*, then, you say, the judge has jurisdiction; then, surely he must have jurisdiction to inquire whether those facts exist. How can it be a condition precedent to issuing the summons, that those facts should exist?] The judge must certainly inquire into the existence of those facts; and if a dispute arose about them, and the inquiry was whether a month had elapsed or not, a false affidavit upon that matter would be perjury; but then it must be shown that that inquiry arose, and that the false oath was material to it. Here the question of retainer is the only one suggested as material. It is consistent with every allegation in this indictment that application had been made by the party *chargeable*, that a calendar month had not expired, and that the judge was aware of those facts when he issued the summons. [PARKE, B.—Would it not be enough to say simply that Sir. R. M. Rolfe, one of the judges of the Court of Exchequer issued his summons; and that before showing cause the defendant made an affidavit concerning the matter mentioned in the summons? Is not this the distinction, that in courts of general jurisdiction, you must intend everything within it, until the contrary appears; in courts of limited and inferior jurisdiction nothing can be intended within it but what is expressly stated: (*Howard v. Gossett*, 14 L. J. Q. B. 367.) CRESWELL, J.—Suppose the court granted a rule *nisi*; and upon cause being shown it appeared that the court had no jurisdiction; could not perjury be assigned upon affidavits made in that matter? COLTMAN, J.—There is an averment that the commissioner had authority to administer the oath.] But that averment does not dispense with the necessity of showing

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(a) See cases cited in *Williams v. Griffith*, 6 Me. & W. 32.

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that the oath was taken in a judicial proceeding: (*Reg. v. Overton*, 4 Q. B. 83). An indictment for perjury committed in the course of bankruptcy proceedings must show that the proceedings were not without jurisdiction: (*Rex v. Jones*, 4 B. & Ad. 345; *Rex v. Punshon*, 3 Camp. 96; *Ewington's case*, 2 Moo. C. C. 223; Car. & M. 319). [PARKE, B.—Commissioners of Bankruptcy have a special, not a general jurisdiction. They are nothing unless there is an act of bankruptcy.] The authority of judges at chambers mainly depends upon acts of Parliament. [PARKE, B.—At all events in this case if we assume that the dates laid under a *videlicet* are correct dates, there is an end of the objection; because it appears that the proper time had elapsed; and we are bound to make that assumption if it is necessary to support the indictment: (*Nightingale v. Wilcoxon*, 10 B. & C. 212; *Whitaker v. Harrold*, 17 L. J., Q. B. 343.)] Then the court are of opinion that month in the indictment means lunar month. [PARKE, B.—Yes; *prima facie* it means lunar month.] All the authorities show that is so. (He referred to *Parker v. Gill*, 10 Jur. 1096; 2 Inst. 674; Co. Litt. 135; 4 Mod. 185; Toml. Dict. "Month.")

PARKE, B.—But, if the *videlicet* is rejected, all appears to be right.

ROLFE, B.—The bill was delivered in August, 1844; and the summons was not issued until April, 1845.

Argument for
plaintiff in
error.

WILLIAMS, J.—If it is necessary to make the indictment good, you must strike out the *videlicet* and prove the dates as laid. *Bissex v. Bissex* (3 Burr. 1729), proves that, in addition to the cases already mentioned.

PARKE, B.—Independently of this point, we do not mean to say that the indictment is bad. On the contrary, I think there is a great distinction between judges of the superior courts and those who possess special limited jurisdictions.

Pashley.—Then the second question is, whether the general judgment of imprisonment can be sustained. Both the *venire* and verdict speak of the "perjury and misdemeanor aforesaid;" that refers to the last count only; and therefore the general judgment is bad. [PARKE, B.—No; misdemeanor is *nomen collectivum*, as was decided in *R. v. Powell* (2 B. & Ad. 75); and that case was not overruled in *Campbell v. The Queen* (2 Cox's Crim. Cas. 463; and 17 L. J. M. C. 89).] The authority of that case is very much shaken by the observations upon it in *O'Connell v. The Queen* (11 Cl. & Fin. 155.) [PARKE, B.—In *O'Connell's case*, *Rex v. Powell* was not at all questioned, so far as it decided that misdemeanor is *nomen collectivum*; but the correctness of that judgment was doubted because one of the counts did not authorize the punishment of hard labour, and yet the sentence was one of imprisonment with hard labour for the whole period.] Still the value of the case as an authority is greatly diminished. (He referred to the observations of Tindal, C. J. (p. 257), and Lord Lyndhurst (p. 316), in *O'Connell's case*.) No approval of that case is expressed anywhere; and the decision is in itself contrary to good sense, when compared with other cases. *R. v. Salomons* (1 T. R. 249), was cited and

recognized in *R. v. Powell*; yet in the former "offence" was held, to be not *nomen collectivum*, and surely "offence" is as general as "misdemeanor," if not more so. [PARKE, B.—In *R. v. Salomons* the judgment was certainly wrong; for if "offences" had been used instead of "offence," the penalty would have been 200*l.*] How is it possible, that "the perjury and misdemeanor aforesaid" can refer to all the counts? [PARKE, B.—It means the misconduct aforesaid.] And yet "the offence aforesaid" means one offence only, and "the felony aforesaid" only the single felony last charged: (*Campbell v. The Queen*, cited *supra*.) [PARKE, B.—In *Campbell v. The Queen* we looked into the old entries and we found that the practice had always been to use the words *feloniæ* and *separatibus feloniiis*; and therefore we felt bound to hold that *felony* was not *nomen collectivum*; but we took great care to show that we did not mean to overrule *Rex v. Powell*. ROLFE, B.—There is this distinction between the words "misdemeanor" and "felony," that the former is a popular and the latter a technical term.] Even if that be so, when the term *misdemeanor* alone is used, it cannot apply here, where the general word is limited by the particular term *perjury*. It is as if the words "*perjury aforesaid*" had stood alone; and the rule is that if the word *aforesaid* can be referred to the last antecedent, it must be so applied: (*Rex v. Wright*, 1 Ad. & Ell. 434.) [PARKE, B.—Can you expect us to overrule *Rex v. Powell* in order to defeat justice by a miserable technicality of this sort? We have a distinct authority that misdemeanor is *nomen collectivum*, and if so, then the plaintiff has been found guilty of all the offences charged.] This indictment shows that there were distinct offences in fact.

PARKE, B.—In the first place, we are all of opinion that this indictment is good for the reasons already stated. If the word "month" in the indictment means lunar month, and in order to give jurisdiction it is necessary that a calendar month should have elapsed, then by taking the dates, laid under a *videlicet* as true, which must be done when the time is material, the jurisdiction is made to appear. Upon the hypothesis, therefore, that the jurisdiction must be shown, the dates, being assumed to be true, show it; but I do not mean to say that it was necessary to aver that the bill had been delivered one month before the application to the judge; on the contrary, my strong impression is, that a judge of a court of general jurisdiction should be taken to have jurisdiction to order taxation until the contrary appears; for quite independently of the statute he would have that authority if an action was brought. Secondly, the authority of *R. v. Powell*, for treating misdemeanor as *nomen generale*, was not meant to be overturned either by the House of Lords in *O'Connell's case*, or by this court in *Campbell v. The Queen*; in which case, upon looking into the authorities, we expressly drew a distinction between *misdemeanor* and *felony*.

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Judgment.

Judgment affirmed.

COURT OF QUEEN'S BENCH.

June 3, 1848.

REG. v. CHORLEY. (a)

Indictment for obstructing public footway—Extinguishment of private carriage-way by public user—Evidence.

Upon an indictment for obstructing a public footway, it appeared that, before that public footway existed, the defendant's ancestors had been entitled to a carriage-way over the locus in quo; but on the part of the crown it was contended that the public user, inconsistent with the assertion of the private easement, had determined it. The learned judge told the jury that no interruption by the public for less than twenty years would destroy the private right.

Held, that that proposition, if presented to the jury as a rule of law or a conclusive presumption of fact, was erroneous, and a misdirection. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred; and the sufficiency or insufficiency of the period in any particular case must depend upon all the accompanying circumstances.

The defendant claimed a way for horses and carriages to certain premises occupied by him, and situated on one side of the lane over which the way was claimed; and as evidence of that right, he produced two old leases of premises situate on the opposite side of the same lane, which leases were granted by persons under whom he claimed and purported to convey with the premises a way to them down the lane for carriage and horses. No distinct act of user under these leases was proved.

Held, that they were admissible in evidence for the purpose of showing that the persons under whom the defendant claimed, being owners of property on both sides of the lane, had assumed to grant a right of way as owners of the lane, or as owners of the property leased to lease with it a right of way derived from some other source; but that they were inadmissible as evidence of reputation, or for the purpose of proving the right of way claimed by the defendant.

The court granted a new trial, although the verdict was for the defendant.

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public footway
—Evidence.

INDICTMENT for obstructing a public footway by driving carts and horses over and along it.

Plea, Not guilty.

At the trial, which took place at Taunton, before Platt, B., during the Spring Assizes of 1847, a verdict was found for the defendant. In the following term, a rule nisi for a new trial was obtained on the ground of misdirection, and the improper reception

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

of evidence; against which, during the sittings after the following Michaelmas term (Nov. 27, 1847),

Crowder, Q. C., showed cause.

Kinglake, Serjt., and *Fitzherbert*, contra.—The following cases were cited: *Moore v. Rawson* (3 B. & C. 332); *Lawrence v. Obee* (3 Camp. 514); *R. v. Bliss* (7 Ad. & Ell. 550.)

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Cur. adv. vult.

JUDGMENT.

LORD DENMAN, C. J.—In the case of *Reg. v. Chorley*, an indictment for obstructing a public footway by driving carts and horses:—Plea, Not guilty; verdict for the defendant:—A new trial was moved for on two grounds: misdirection of the learned judge, and the improper reception of two ancient leases in evidence. It appeared that the lane in question was so narrow, that when a cart or waggon passed through it there was not room for the foot passengers on both sides, nor indeed could one pass conveniently without apprehension and danger on one side. Some old witnesses spoke to the constant user of it by foot passengers, and to the existence of posts at one end, with a turnstile in the centre of it, which must effectually have prevented its being used by carts. These posts and stile, however, had disappeared for a great many years, how many was left in uncertainty, but some witnesses carried it back for fifty years, and there was uncertain evidence of their renewal at a later date. The defendants, however, did not dispute that there was still a public footway, nor did it appear on the evidence that at any time the existence of the user had been discontinued, but the defendant contended that he was entitled to a private carriage-way to his premises, which were some way down the lane on one side, and that the public right had been acquired subsequently, and was subservient to his private right. It must be taken, we believe, that the jury did not give credit to the evidence for the crown of the very early public user before the commencement of a private user was shown; for if that had been believed, it is obvious that no private right could have been acquired, which was in derogation of it, except in some mode not pretended in the case before us; and no complaint is made that this part of the evidence was not properly submitted to the jury. But, assuming that the evidence of private user preceded the public, it is complained that the judge misdirected the jury in telling them that nothing short of twenty years user by the public in a way inconsistent with the private user could destroy that right; and we are to consider whether he was warranted in that direction. We must assume that the jury have found the private right once well commenced, and as the public footway was admitted on the part of the defendants, qualified only to the extent of his private right, the question in the cause really was the continuing existence of that private right, or, to put it in other words, whether that right, once well commenced, had been in any way released, abandoned, or destroyed. The mode in which the prosecutor contended that the right must

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be taken to have come to an end was, by the public user, and obstruction, inconsistent, as it was said, with the assertion of the private easement; and this gave occasion to the ruling which is complained of. The learned judge appears to have told the jury that no interruption by the public for a shorter period than twenty years would destroy the right. If this were laid down as a rule of law, or even as a conclusive presumption of fact, we think in the former case it was erroneous, and in the latter would be likely to mislead the jury as turning their attention to a definite period of time as the ground for decision, when time might in truth be wholly immaterial, or only in part material. If, on the other hand, the learned judge had done no more than remark, that if a mere ceasing to use the private way, or a mere acquiescence in the interruption by the public were relied on, it would be prudent in them not to rely on such mere cesser, or acquiescence, unless shown for twenty years, we think such a remark could not have been quarrelled with, and certainly would have been no misdirection. We gather, however, from the learned judge's report, that it was so stated to the jury, that they could scarcely fail of understanding it in the former sense, as something by which they were to be definitely bound, and therefore think there ought to be a new trial. The learned judge appears to have proceeded on the ground, that, as twenty years' user in the absence of an express grant would have been necessary for the acquisition of the right, so twenty years cesser of the use in the absence of any express release was necessary for its loss. But we apprehend, that, as an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act, clearly indicative of an intention to abandon the right, would have the same effect, without any reference to time. For example, this being a right of way to the defendant's malthouse, and the mode of user by driving carts and waggons to an entrance from the lane into the malthouse yard, if the defendant had removed his malthouse, turned the premises to some other use, and walled up the entrance, and then for any considerable period of time acquiesced in the unrestrained use, by the public, we conceive the easement would have been clearly gone. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury. The period of time is only material, as one element, from which the grantee's intention to retain or abandon his easement, may be inferred against him; and what period may be insufficient in any particular case must depend on all the accompanying circumstances. This is the principle on which the judgments of all the members of this court proceeded in *Moore v. Rawson*, and which was adopted in *Liggins v. Inge* (7 Bing. 682, 692.) It is true that those were cases between two individuals, and not between the public and one individual, but that can make no difference; because, assuming the defendant's

to have been the prior right, his was the dominant tenement; the lane was the servient tenement; the owner of this last then could not dedicate absolutely to the public so long as it remained subject to the prior right, he could give nothing but what he himself had, a right of user, not inconsistent with the defendant's easement. The question, therefore, whether the owner has effectually made an absolute dedication to the public, necessarily involves this, has the defendant released the right which he enjoyed? And in the present case, though time would be very material, yet the nature both of the obstruction at one end by posts, of the user by the public, and the amount of acquiescence by the defendant were also so material, that the attention of the jury should have been pointedly drawn to them. Their conclusion might very possibly have been the same, but, in the uncertainty, we think the present verdict has not been satisfactorily arrived at. It may be right also to express our opinion on the point of evidence, as it may be again presented to the judge on a second trial. The leases received after objection were, the first, of the date of 1674, by which one John Whitham purported to grant for ninety-nine years, determinable on three lives, certain premises with a way to them down this lane for carriages and horses; and the second, of 1691, by which one Joseph Whitham purported to grant for a similar term the same parcels with the same way. No enjoyment, or acts of user were proved distinctly referable to either lease; but it seemed agreed that the premises leased were not those occupied by the defendant, but some on the opposite side of the lane; and evidence was given from the court rolls to show that the defendant's premises were formerly the property of the Whithams, and that defendant's title came from them. The inference, then, to be drawn from the deeds was, that those under whom the defendant claimed were the owners of property on both sides of the lane, and that in making a lease of property on one side they had assumed either to exercise an act of ownership over the lane, and to grant a right of way along it to a certain point, or that, as owners of the property leased, they had a right of way to it, derived from some other source, which they leased with it. And, considering the antiquity of the documents, and that no objection was made to the custody from which they came, we think they were admissible for the purpose of drawing these inferences without proof of any distinct act of enjoyment under them. The question, however, will be whether they were admissible to *prove the right of way in question*. Now they purported to show, either that the Whithams were not grantees of an easement, but lords of the soil, and, as such, grantors of an easement upon it to the occupier of another tenement, and that only for a term, or that, having in themselves the right of way appurtenant to the tenement leased, they had granted that with the tenement to the lessee. In either alternative they did not go to prove the right on which defendant stood during the trial. Nor could they be receivable as evidence of reputation, for, if they proved anything it was the fact of a dis-

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ting grant. Therefore, without saying that a state of things might not arise, nor a purpose be suggested, in and for which, on a second trial, these deeds might be receivable, it is enough to say that we think they were improperly received for the purpose for which they were tendered on the last occasion. The rule, therefore, for a new trial will be absolute. *Rule absolute.*

CROWN CASE RESERVED.

January 20.

(Before LORD DENMAN, C. J., PARKE, B., ALDERSON, B.,
COLERIDGE, J., and COLTMAN, J.)

REG. v. READ AND OTHERS.(a)

Assault—Consent of infant.

On an indictment for a common assault, the following verdict was returned:—"Guilty; the child being an assenting party, but that, from her tender years, she did not know what she was about." Held, that the defendant ought to have been acquitted.

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—
Assault.

THE following case was reserved from the Surrey Quarter Sessions for January, 1849:—

CASE.

"At the General Quarter Sessions of the peace of our Sovereign Lady the Queen, holden at St. Mary, Newington, in and for the said county of Surrey, on Tuesday, the second day of January, 1849, George Read, late of the parish of Wimbledon, in the county of Surrey, Ralph Read, late of the same place, and John Barlow, late of the same place, aged respectively thirteen, twelve, and eleven years, were charged in the same indictment with a common assault on Elizabeth Ellen Searle, a girl of nine years of age.

"It was proved at the trial that the four parties went into a hay-loft, when each of the three boys had connexion with the girl, and penetration was effected in each case. When the boys first began to take liberties, the girl showed some unwillingness; but eventually she ceased to offer any opposition, and apparently assented.

"The verdict of the jury was guilty, the child being an assenting party, but that from her tender years she did not know what she was about.

"The question reserved for the opinion of the court is, whether, under the peculiar circumstances of the case, the girl being of

(a) Reported by B. C. ROBINSON, Esq., Barrister at-Law.

the age of nine years only, actually did give, or was competent to give, such assent to the act in question as to invalidate the conviction for a common assault.

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READ AND
OTHERS.
—
Assault.

“THOMAS PUCKLE,

“Jan. 1, 1849.

“Chairman of the Sessions.”

Needham, for the defendants, was about to contend on their behalf that the verdict amounted to “Not Guilty,” when the court called on

B. C. Robinson to support the conviction.

LORD DENMAN, C. J.—How can it be contended that when the jury have found that the prosecutrix consented, a verdict of guilty can be sustained?

B. C. Robinson.—There are two grounds on which it is submitted that the verdict amounts to a conviction; first, that there is a presumption of law that a child of tender years cannot give consent to that which amounts to an injury to her. Secondly, that on the face of the verdict the jury have found that the child did not consent.

PARKE, B.—But are there not several cases directly against the presumption you speak of? It seems to me that *Meredith's case* (8 C. & P. 589), and *Martin's case* (2 Moo. C. C. 179), settle the question.

B. C. Robinson.—Those were cases where the prosecutrix was between the ages of ten and twelve. The 9 Geo. 4, c. 31, s. 17, draws a distinction between consent given by a girl under ten and by one above that age. In the first case, consent makes no difference. The carnal knowledge is a felony, just as if no consent were given. Above the age of ten, consent entirely destroys the felony. In the one case consent is to a certain extent effectual as a justification, in the other it is not so. But a further distinction exists: *R. v. Owen* (4 C. & P. 236), decides, that an infant under fourteen is by presumption of law not *doli capax*, and that where a child of that age is charged with an offence, proof of intelligence, and a knowledge of right and wrong, must be given. It is submitted, that the same rule applies to children, under all circumstances, to witnesses, as well as to young persons charged with an offence; and it is to be assumed, that such evidence, or what was equivalent to it, appeared in the cases cited by my lord, for the witnesses appeared in the box, they gave their testimony in the hearing of the jury, who had an opportunity, therefore, of judging of their intelligence, and of deciding whether they were capable of exercising discretion, and an independent will in the consent which they were proved to have given. Here the jury have had the same opportunity of judging, and have declared that such discretion did not exist. If, then, a prosecutor cannot assume a child's capacity where the child is charged with an offence, still more reason does there appear why a defendant should not be permitted to assume it for the purpose of justifying his own vicious act. An assault always implies an intention to do an injury; because the same act

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may be indictable, or otherwise, according to the intention with which it is done (Hawk. P. C. b. 1, c. 60, s. 26); and on general principles of law and of common sense, it is submitted that a child cannot consent to another inflicting injury upon it. Suppose a man to place his private parts against the person of a child two years old. It might be clear that he had no intention to attempt to carnally know the child, and he could not, therefore, be charged with that offence or the attempt. Unless the presumption I contend for is upheld, he might do so with impunity, if it appeared that the child gave any apparent consent. If a child were playing with a sovereign that had been given to it, and a man asked it to give him the money, and it were to do so, and the man ran away with it, could it be contended that that would not be larceny? And yet it would be so, on the ground that the child was incapable of giving consent to his tortious act. Although the case states the youth of these defendants, the question is the same as if they were full-grown men; for *malitia supplet aetatem*, and it is to be presumed after the verdict that everything necessary to be proved was proved, and that they were therefore *doli capaces*.

ALDERSON, B.—Yes, that is so.

B. C. Robinson.—To hold, then, that a consent extorted from the weakness of children would justify acts perhaps destructive eventually to them, and highly prejudicial to the well-being of society, would be a doctrine of most dangerous tendency. Secondly; if there is no such presumption of law, at all events the jury have found by their verdict that the child did not consent.

PARKE, B.—But they expressly say she did.

B. C. Robinson.—It is submitted that the whole verdict must be taken together; if the word assenting is to control the word guilty, then the subsequent portion of the sentence must control the word assenting: and thence it clearly appears that the jury meant by that word a mere mechanical assent—an act without a will. But a consent sufficient to justify an assault must be an active one; positive permission must be given. It is not like the case of rape, in which it has been held that there must be resistance on the part of the prosecutrix to constitute it.

LORD DENMAN, C. J.—That is not the opinion of the judges.

ALDERSON, B.—Certainly not.

B. C. Robinson.—Some of your lordships appear to have thought in *R. v. Camplin* (see in *R. v. Page*, 2 Cox C. C. 133, observations made by Alderson, B.), that a connexion *without* the consent of the woman was a rape, as in the case of a woman insensibly drunk in the streets; but the distinction between “*against the consent*,” and “*without the consent*,” appears to have been acted upon in *R. v. Williams*, 8 C. & P. 286, and *R. v. Saunders*, 8 C. & P. 266. There, in each case, the prosecutrix allowed the prisoner to have connexion with her, believing him to be her husband; and Alderson, B. in the one instance, and Gurney, B. in the other, held that, although the actual consent prevented the crime being that of rape, the prisoner might be convicted of an

assault. It could not be said to be against consent, when that was, in fact, given, but it might be held to be *without* consent, inasmuch as what was given was obtained by fraud. The facts in those cases are quite analagous to these. There the jury might have said "guilty," the woman assenting, but by reason of the fraud practised upon her by the prisoner, not knowing what she did. This case is put on the ground of fraud. The child is found to have no discretion. A person of intelligence and experience takes advantage of her ignorance, and obtains a *quasi* consent to his injuring her. There is as much fraud in the one case as the other; and a fraud so much the more dangerous, because so much more easily practised. Those cases decide that there must be a discretion, not a mere will, on the part of the person assenting, and a discretion, moreover, exercised upon a full knowledge of the facts. But how can it be said that there is such a discretion here, when the jury have expressly negatived its existence? In all civil matters, any act which a child does, injurious to its own interest, is void, and that because there is a presumption that more experienced persons may have sought to make a profit of its weakness. Here, not only is there such a presumption, but the jury have found the fact that those who assert the validity of the act are wrongdoers.

PARKE, B.—But can we assert that this is an assault, in the face of *R. v. Meredith* and the other cases?

B. C. *Robinson* admitted that, unless he had distinguished those cases, the prosecution must fail, but that if that were done, he submitted that the argument on principle was conclusive.

ALDERSON, B.—Why do the jury say that the child assented, unless she did so? Here, on all the facts as submitted to us, it is clear she did give consent.

B. C. *Robinson*.—The jury put the verdict in their own language, and have stated, perhaps, in no very technical terms, the real facts of the case. They could not say the child did not consent, unless the judge told them that a consent under such circumstances—that she did not know what she was about—was no consent in law; and the object is to ascertain from your lordships whether such a ruling would be a correct one.

LORD DENMAN, C. J.—We think, on the case submitted to us that the defendants are entitled to an acquittal; we cannot distinguish this from the cases of *R. v. Meredith* and *R. v. Martin*.

The rest of the learned judges concurred.

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Assault.

CROWN CASE RESERVED.

January 20, 1849.(Before LORD DENMAN, C. J., PARKE, B., ALDERSON, B.,
COLERIDGE, J., and COLTMAN, J.)

REG. v. ALLEN. (a)

*Unnatural crime—Evidence.**On an indictment for sodomy, it was proved that the prisoner induced a boy of twelve years of age to have carnal knowledge of his person, the prisoner having been the pathic in the crime.**Held, that the evidence was sufficient to support the indictment.*REG.
v.
ALLEN.*Unnatural
crime.*

THE following case was reserved at the December session of the Central Criminal Court by Mr. Baron Rolfe :—

CASE.

“ At the December sessions of the Central Criminal Court Henry Allen was tried before me for an unnatural crime.

“ The first count charged that the said Henry Allen, in and upon one John Wood, feloniously did lay his hands, and then and there feloniously, wickedly, diabolically, and against the order of nature, had a venereal affair with the said John Wood, and him the said John Wood, then and there feloniously, wickedly, diabolically, and against the order of nature, did carnally know, and then and there feloniously, wickedly, diabolically, and against the order of nature, with the said John Wood, did commit and perpetrate the detestable, abominable, and horrid crime of b——.

“ The second count charged that the prisoner feloniously, wickedly, diabolically, and against the order of nature, was consenting to and did permit and suffer the said John Wood feloniously, wickedly, diabolically, and against the order of nature, to have a venereal affair with him the said Henry Allen, and then and there feloniously, wickedly, diabolically, and against the order of nature, to carnally know him the said Henry Allen, and with him the said Henry Allen, then and there feloniously, wickedly, diabolically, and against the order of nature, to commit and perpetrate the detestable, abominable, and horrid crime of b——. And that the said Henry Allen did then and there feloniously, wickedly, diabolically, and against the order of nature, commit and perpetrate, with the said John Wood, the detestable, abominable, and horrid crime aforesaid, against the form of, &c.

“ The facts proved were, that the prisoner induced John Wood, a boy of twelve years of age, to have carnal knowledge of his person, the prisoner having been the pathic in the crime.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

"The jury found the prisoner guilty, but I had doubt whether the facts supported either count, for reasons which will be obvious.^(a)

"I request the opinion of the judges on the case.

"R. M. ROLFE."

LORD DENMAN, C. J.—I need only say that we have considered this case, and are all of opinion that the conviction was right.

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v.
ALLEN.
—
*Unnatural
crime.*

CROWN CASE RESERVED.

January 20, 1849.

(Before LORD DENMAN, C. J., PARKE, B., ALDERSON, B.,
COLERIDGE, J., COLTMAN, J., and PLATT, B.)

REG. v. WYNN. (*b*)

Stealing and secreting letters.

On an indictment under the 7 Will. 4 & 1 Vict. c. 36, s. 26, against a clerk in the Post-office, containing a count for stealing and another for secreting post-letters, the jury found that the prisoner, having committed a mistake in the sorting of the letters in question, secreted them in the water-closet, in order to avoid a certain penalty with which such a mistake was usually visited by the authorities of the Post-office.

Held, that such finding amounted to a verdict of guilty on both counts.

THE following case was reserved from the August Session of the Central Criminal Court by Mr. Baron Platt:—

CASE.

"The prisoner was tried before me, on the 23rd of August last, at the Central Criminal Court, on an indictment charging him with stealing (*c*) whilst employed in the Post-office, two post letters, containing one half-crown, one sixpence, three postage stamps, and two sovereigns, the property of Her Majesty's Postmaster General.

"He was employed in the Post-office, and his duty was to open the bags brought to the particular table at which he was placed, take out the letters and separate them. The Scarborough bag, which contained, amongst others, the two letters described in the

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—
*Post-office—
Secreting
letters.*

(a) It may be stated that the doubt entertained by the learned judge was, whether the agent, being under the age of fourteen, and therefore incapable of committing the crime, the prisoner could, under the circumstances, be charged with having committed the offence.

(b) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

(c) Although the count for secreting was not mentioned in the case, it was, as will be seen, discussed on the argument, and the opinion of the judges upon it expressed.

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indictment, was brought to his table. He opened it, took out all the letters and put them on the table before him. Twenty or thirty bags were opened on the same table by the prisoner at the same time, and the letter bills of the several bags were by him spread before him on the table. It then became his duty to separate the registered letters and unpaid letters from the unregistered paid letters, fold the registered letters in the bills, and place them in a drawer. In the course of this separation he put two unregistered letters in one of the letter bills, and some of the registered letters in their respective bills in the drawer, from which he afterwards gave them to the register clerk to check the bills containing them. He afterwards put the rest of the registered letters in the drawer, and carried them when collected to the register clerk. When he had done so, he returned towards his table and went to a water-closet. He was observed to hold in his hand what appeared to be a bill folded over letters, was followed, and, after he had placed himself with his breeches down on the seat of the water-closet, was observed to put his hands between his legs. He was immediately taken into custody. On his coming from the water-closet the two letters, sealed and unopened, lay on the paper contained in the pan.

"It appeared in evidence that if, through neglect, the letters were not accurately sorted, the person guilty of such neglect was liable to be punished.

"The jury found that the prisoner, having committed a mistake in the sorting of the letters in question, secreted them in the water-closet in order to avoid the supposed penalty attached to such mistake.

"Upon this verdict the judgment has been respited. The evidence adduced on the trial will be found in page 476 of the shorthand writer's notes for the 10th session, sent by the Corporation of London to the judges.

"T. J. PLATT."

Argument for
the prisoner.

Ballantine, for the prisoner.—Although the indictment is not mentioned in the case, there are but two counts that will come under consideration here—one alleging the stealing, and the other the secreting. It is on the second that the prosecution will principally rely, after the finding of the jury. It is submitted, however, that this does not amount to a crime unless it is a stealing within the act,—secreting, without more, will not do; because that word, (a) taken in conjunction with the other words of the statute, must be taken, in accordance with general principles, to be *ejusdem generis* with stealing, and that must be with an unlawful purpose. It therefore raises the question whether the finding of the jury will support a count for stealing. The cases of *R. v.*

(a) The following is the section of the act of Parliament upon which the judgment was framed:—"That every person employed under the post-office, who shall steal, or shall for any purpose whatever embezzle, secrete, or destroy, a post-letter, shall be guilty of felony, and shall, at the discretion of the court, either be transported beyond the seas for the term of seven years, or be imprisoned for any term not exceeding three years," &c.

Elizabeth Jones (1 Den. C. C. 188; 2 Cox's Crim. Cas. 6, S. C.); and *R. v. Privett and Goodall* (2 Car. & Kir. 114; 2 Cox's Crim. Cas. 40), decide what is a sufficient *lucri causâ*, but there is a clear distinction between those cases and this. There there was a direct severance of the property from the owner; here there is no severance whatever. The prisoner is in possession of the letter lawfully; there is no period at which such severance can be said to have taken place. Suppose a servant to take out of his master's library a book, for the purpose of reading it; and having dirtied it, he destroyed it, to prevent his master finding that he had done so; or suppose he threw it into the street, to avoid detection, he could not be indicted for larceny.

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letters.

PARKE, B.—But can you speculate upon the purpose? The words of the act of Parliament are, “if he shall secrete it for any purpose whatever.”

Ballantine.—The argument turns on the meaning of this word “secrete.” Suppose he secreted it for the purpose of delivering it to his master.

LORD DENMAN, C. J.—But we must surely treat the matter with reference to the object of the act of Parliament, and not with regard to cases of ordinary larceny.

Ballantine.—It is contended still that some limitation must be put upon the word “secrete,” and that it is not to be taken in its widest sense. It does not appear by the finding that the prisoner ever intended to take away the entire dominion of the letter from the Post-office authorities. All that is stated is, that it was secreted in the water-closet. It might have been put there for the purpose of being found by his superiors.

COLERIDGE, J.—You must take the word “secrete” with reference to the facts stated by the case.

PARKE, B.—Does he not put it away to derive some benefit to himself? Suppose a servant takes a chattel and locks it up in a box, with intent to deprive the owner of it.

Ballantine.—If he placed it there for the purpose of taking care of it, it would not be larceny, and there is no absolute presumption that it was done otherwise.

COLERIDGE, J.—If he was utterly regardless as to whether it was found or not, would not that suffice? Here the delaying of the delivery of a letter for an hour is within the words, and may be within the meaning, of the act.

Ballantine.—If the case had found that the prisoner destroyed the letter, then that might be sufficient, for there are words in the act of Parliament that meet such a case; but there is no such statement here.

ALDERSON, B.—Because, in fact, he did not destroy; but does not the word “secrete” imply an attempt to destroy, which was precisely what the statute intended.

PARKE, B.—Surely the whole question must be, whether a man commits larceny when he makes away with property of his master to prevent inquiry. Then, as to the asportation, it occurs the moment he parts with it from his hand.

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—
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letters.

Ballantine.—Then the indictment ought to state for what purpose the secreting took place.

PLATT, B.—But the court can only decide upon the case reserved; the record is not here.

Clarkson and Bodkin, for the prosecution, were not called upon to support the conviction.

Judgment.

LORD DENMAN, C. J.—In the first place, is this not a secreting within the statute? The act of Parliament is very clear upon this point. It applies to a particular class of persons—all those dealing with Post-office letters, and seems especially framed to meet the tortious acts which they are peculiarly capable of committing. They are entrusted with property of great value, but different in character from property generally. They are not treated in the act as ordinary thieves, but certain duties are imposed upon them in respect to the property with which they are entrusted, and it is the violation of those duties which the statute was intended to prevent; and, therefore, the Legislature declares it a crime to secrete a letter for any purpose whatever. It is clearly not necessary under such circumstances to state in the indictment what that purpose was. This is the rule upon general principles; because the prosecutor may not know the purpose, or have any means of doing so; but the point was expressly decided in the case of *R. v. Douglas*, 2 Cox's Crim. Cas. 251. There the words of the 33 Geo. 3, c. 52, s. 62, are that "the demanding or receiving any sum of money or other valuable thing as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for and pretended to be for the use of the East-India Company, or of any person whatever," &c., shall be an offence, and it was held not necessary to state for whose use the moneys were received. The same principle applies to this indictment. The wilful secretion could not have been resorted to for no purpose. As to the question of larceny, I am clearly of opinion that it is made out. We can only argue on the evidence of the case—upon the facts and circumstances before us. We find the prisoner, who had received the letter in the course of his duty, retiring to a private place and dropping the letter under such circumstances that it would be probably destroyed, and this for the purpose of avoiding the penalty of previous misconduct. That is a sufficient *lucri causâ*. It deprives the owner of the property. The letter was meant to be entirely withdrawn from him, for it cannot be gravely argued that it was intended he should find it. As to the *asportavit*, no doubt it occurred the moment the letter dropped from his hand. It appears to me, therefore, that the count for secreting is sustained by the evidence.

The rest of the judges concurred.

NORFOLK CIRCUIT.

HUNTINGDONSHIRE SUMMER ASSIZES, 1848.

Huntingdon, July 20.

(Before BARON PARKE.)

REG. v. BARTON. (a)

Murder—Insanity—Monomania.

A mere uncontrollable impulse of the mind, coexisting with the full possession of the reasoning powers, will not warrant an acquittal on the ground of insanity. The question for the jury being, whether the prisoner, at the time he committed the act, knew the character and nature of the act, and that it was a wrongful one.

THE prisoner was indicted for the wilful murder of Harriet Barton, on the 22nd of June, by cutting her throat with a razor.

Wells, for the prosecution, proved that the prisoner and the deceased were husband and wife, and that, up to the day named in the indictment, he had always treated her and their children with kindness. On the afternoon of the 21st of June the prisoner and his wife were seen talking with their next-door neighbour at their door late at night, and at four o'clock in the following morning it was discovered that he had cut the throats of his wife and child, and that he had attempted to commit suicide. When questioned by the surgeon, he exhibited no sorrow or remorse for his conduct, but stated that "trouble and dread of poverty and destitution had made him do it, fearing that his wife and child would starve when he was dead." He also said that he had contemplated suicide for a week past; that he had not had any quarrel with his wife, and that, having got out of bed to destroy himself, the thought had first come into his head to kill his wife and child; that he had first attacked her while asleep in bed, and that she got away from him and rushed to the window, calling for help; that he then killed the child, and, seizing his wife, pulled her backwards towards him, in which position he had cut her throat. This done, he next tried to cut his own throat, but his powers failed him, and he did not succeed, though he wounded himself severely, his wife having fallen down dead by his side. This narrative, coupled with a knowledge of the prisoner's private circumstances, induced the surgeon to form the opinion that the prisoner, at the time he committed the act, had not, in consequence of an uncontrollable impulse to which all human beings were subject, any control over his conduct. The desire to inflict pain and injury on those previously dear to the prisoner was in itself a strong symptom of insanity, and the impossibility of

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*Insanity—
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(a) Reported by J. B. DASENT, Esq., Barrister-at-Law.

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resisting a sudden impulse to slay a fellow-being, was another indication that the mind was insane. There was not necessarily a connexion between homicidal and suicidal monomania, though it would be more likely that a monomaniac who had contemplated suicide should kill another person, than for one who had not entertained any such feelings of hostility to his own existence. Monomania was an affection which, for the instant, completely deprived the patient of all self-control in respect of some one particular subject which is the object of the disease. It was true that the prisoner had no delusion, and his reasoning faculties did not seem to be affected; but he had a decided monomania evincing itself in the notion that he was coming to destitution. For that there was some foundation in fact, but it was his (the surgeon's) decided opinion that the prisoner was in an unsound state of mind at the moment he cut his wife's throat, though he would not be so in all cases of murder.

It was also proved that on the 21st of June the prisoner had caused his razor to be sharpened, saying that he wanted it to give to some friend.

Couch, for the prisoner, submitted that the jury were bound, after the testimony of the surgeon, to acquit the prisoner on the ground of insanity, and he proceeded to show by other witnesses that the prisoner had suffered a severe pecuniary loss not long before the occurrence of the dreadful event now the subject of inquiry, and that it had produced a decided effect on his mind, giving rise to the most gloomy anticipations on account of his wife and family.

PARKE, B. told the jury that there was but one question for their consideration now, viz., whether, at the time the prisoner inflicted the wounds which caused the death of his wife, he was in a state of mind to be made responsible to the law for her murder. That would depend upon the question whether he, at the time, knew the nature and character of the deed he was committing, and if so, whether he knew he was doing wrong in so acting. This mode of dealing with the defence of insanity had not, he was aware, the concurrence of medical men; but he must, nevertheless, express his decided concurrence with Mr. Baron Rolfe's views of such cases, that learned judge having expressed his opinion to be that the excuse of an irresistible impulse, co-existing with the full possession of reasoning powers, might be urged in justification of every crime known to the law—for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse. Something more than this was necessary to justify an acquittal on the ground of insanity, and it would be therefore for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse under which the prisoner had committed this deed was one which altogether deprived him of the knowledge that he was doing wrong. Could he distinguish between right and wrong? Reliance was placed on the desire to commit suicide,

but that did not always evidence insanity. And here the prisoner was led to attempt his own life, by the pressure of a real substantial fact clearly apparent to his perceptive organs, and not by any unsubstantial delusion. The fact, however, must be taken into the account, for it might have had a serious effect on the mind of the prisoner, as also the absence of any attempt to escape from justice, and the want of all sense of sorrow and regret immediately after the death of his wife, contrasted with his more natural state of mind afterwards when he felt and expressed regret and sorrow for his act. These circumstances ought all to be taken into consideration; but it was difficult to see how they could establish the plea of insanity in a case where there was a total absence of all delusion.

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Insanity—
Murder.

Guilty—Sentence of death passed. (a)

NORFOLK CIRCUIT.

HUNTINGDONSHIRE SUMMER ASSIZES, 1848.

Huntingdon, July 21.

(Before BARON PARKE.)

REG. v. WOOD.

Larceny by finding—Bank note.

Where lost property is found, the appropriation of it by the finder is not larceny, unless he knew, or had reasonable means of ascertaining, the owner.

Quære whether, in the case of a bank note, the finder can be indicted for felony on the proof that, though he did not know the owner when he found the note, he did know him before he put it off?

THE prisoner was indicted for stealing a promissory note for the payment of 5*l.*, the property of Samuel Brown. REG. v. WOOD.

Worlledge, for the prosecution, proved that the note in question, a country bank note for 5*l.*, was dropped by the governess of the prosecutor on the road from his house to Somersham, where the prisoner lived. Soon after the lady discovered her loss, she returned along the road, but could not find any trace of the note; and the fact and particulars of the loss were communicated to the prisoner and others on the same evening at a late hour, and on the following morning also. In the course of the day after the loss the prisoner changed the identical 5*l.* note, which he stated he had found; and when he was taken into custody on the charge of stealing it, he repeated that statement.

Larceny by
finding.

(a) It appears that in this case the prisoner has been reprieved.

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finding.*

When called on for his defence, the prisoner stated that he had found the note.

PARKE, B., in summing up the case to the jury, observed that there could not be any felonious appropriation of lost property unless the finder knew, or had reasonable means of ascertaining, who was the owner of it. In this case it would be a question for the jury, whether the finder of a note payable to bearer, and having no mark of ownership about it, could he said, at the time of finding it, necessarily to know, or have the means of discovering, the owner. If they thought that he could not know who the owner was, they ought to come to the conclusion that the prisoner when he found and appropriated the note did not commit a felony. But there was another question on which the jury should give their opinion, and that was, whether at the time the prisoner changed the note he knew or had reasonable grounds for believing that the prosecutor was the owner of it and had lost it. The answer to this question was desirable, in order to raise the point whether the acquisition of a knowledge of the ownership, in the interval after the finding and before the putting off of the note, made any difference in the case. As at present advised, he would direct the jury as a matter of law to find the prisoner guilty of felony, if they thought he knew who the owner was before he put off the note, and then the question might be reserved for future discussion. If they should find the prisoner guilty on this ground alone, he would consider whether such a verdict ought to stand, or whether its propriety should be canvassed before the assembled judges.

The jury found that the prisoner did not know when he found the note who was the owner; but that he did know who was the owner when he put it off.

PARKE, B. then directed a verdict of guilty to be entered, as the result of that special finding, but deferred sentence.

On the following day the prisoner was brought up, and

PARKE, B. ordered him to be discharged on entering into his own recognizances to come up and receive the judgment of the court at the ensuing assizes, if the judges should in the mean time think the conviction correct.

Guilty.

NORFOLK CIRCUIT.

CAMBRIDGESHIRE SUMMER ASSIZES, 1848.

Cambridge, July 22.

(Before MAULE, J.)

REG. v. WARD. (a)

Perjury in the County Court—Evidence.

*ment for perjury before the Judge of the County Court alleged
plaint being entered against the defendant in a certain County
at W., duly constituted by order in council under the statute, he
ed and was examined, and gave certain false evidence, &c.*

*That the fact of the defendant's appearance might be proved
al testimony, though it appeared that it was entered in a minute-*

*it the appearance of the defendant dispensed with the necessity
ing the summons.*

*it the proceedings and evidence might be proved without the
tion of the minute-book, the judge having summary jurisdiction.
t the allegation of the constitution of the court by an order in
might be proved by the judge himself by showing that the judge
i that capacity, and in examination of the act in question.*

URY.—The indictment stated that there being a certain
int lodged against the defendant by one A. B. of Emneth,
Cambridge County Court, at Wisbeach, before J. D. Bur-
sq., the judge of the same, in August, 1847, the same
to be heard, tried, and determined in the said court by
judge, and that in the course of the said trial it became
a material question whether the prisoner had been at
am, working on the railway from the 15th of May to the
June, 1847, and had not during all that time been at Em-
within ten miles of it, and that the defendant being duly
cc., knowingly, wilfully, and falsely did depose and swear
had been at Hunterham at work on the railway from the
1 of May to the said 10th of June, 1847, and had not been
en miles of Emneth during that interval, whereas in truth
ct, &c. &c. &c.

r, for the prosecution, proved by the clerk of the County
iat such a plaint had been filed, and he proposed to give
oof of the proceedings at the trial; but it appearing that
is a minute-book wherein were entered the plaints, the
ice of the parties, and the result of the trial,

REG.
v.
WARD.

Perjury.
—*Evidence.*

(a) Reported by J. B. DASENT, Esq., Barrister-at-Law.

REG.
v.
WARD.
—
*Perjury—
Evidence.*

Couch, for the prisoner, submitted that it was necessary for the prosecution to produce that book. The clerk had admitted that there was such a book kept by him, and that it ought to contain, and did contain, an entry of the plaint and of the appearance of the defendant thereto. The indictment contained an express allegation of the existence of the plaint and the appearance of the prisoner, and those facts ought to be proved by the best evidence applicable to the case. The proceedings, too, were entered in this book; that is to say, the result, and it might be that the book itself would not be admissible, unless it contained the evidence taken at the trial. The alleged perjury could not be proved by parol if it was taken down by the judge, as it ought to be, or by his clerk, in the book. In addition to these objections, the prosecutor was bound to prove that the defendant was summoned to appear, that being a necessary step in order to give the judge jurisdiction over the matter.

Palmer contended, that there was nothing in any of the objections. In the first place, the judge had a summary jurisdiction. He need not take down a word of the evidence unless he deemed it advisable to do so. The book would not, therefore, necessarily contain that evidence, but the perjury would be proved by the judge from his rough notes hereafter. Then, as to the summons, the appearance of the defendant obviates the necessity of proving that; and as to proof of the appearance, that is a fact which may be proved by any one present who saw him, without the production of the minute-book, which no doubt would contain an entry of the fact in the regular course of the proceedings.

MAULE, J.—I think the want of proof of summons is answered by the fact of the defendant's appearance, which may be proved by parol. That is sufficient to carry the case on, but if it should be necessary, I will reserve the other points.

Evidence received.

Palmer then proposed to prove the allegation in the indictment that the County Court at Wisbeach was duly constituted under the Small Debts Act, by putting in the *Gazette* of February 15, 1846.

Couch.—The proper way to prove the constitution of the court is by putting in the Order of the Queen in Privy Council to that effect on the 15th of March. The *Gazette* now tendered would not prove the order even if it contained it, which it does not. It merely contains an announcement of the intention of Her Majesty to make the order in question on the 15th of March, such notice being required by the act. The prosecutor must therefore go on, not only to prove the notice by this *Gazette*, but also the order which was afterwards issued in pursuance of it, before he can consider that he has proved the constitution of the court, and the appointment of Mr. Burnaby as its judge. It might be that Mr. Burnaby was a judge of a County Court of a totally different jurisdiction from those created by this act.

Palmer, contra.—The allegation need not be proved in the strict manner contended for. It is enough if we show that Mr. Burnaby acted as the judge of a County Court; and that we can do readily. That would substantially prove the allegation that the court was constituted by an order in council.

MAULE, J.—The *Gazette* is clearly the wrong one, at all events; but it is unnecessary to go into the point, for I agree with Mr. Palmer that proof that Mr. Burnaby acted in the capacity of judge of this court, in pursuance of and under the County Courts Act, will suffice. It is just something to go to the jury in proof of the substance of the allegation, which ought to be proved.

Evidence received.

Mr. Burnaby was then examined, and the case having gone to the jury on the merits,

The prisoner was convicted.

REG.
v.
WARD.
—
*Perjury—
Evidence.*

HOME CIRCUIT.

KENT SUMMER ASSIZES, 1848.

(Before COLTMAN, J.)

REG. v. WILLMETT. (a)

Possession of naval stores—9 & 10 Will. 3, c. 41.

The bare possession of marked naval stores does not render a person liable to be convicted under 9 & 10 Will. 3, c. 41, if he be ignorant that the stores are so marked.

A defendant charged with the possession of two lots of marked naval stores produced at his trial two certificates in respect of the different lots, signed respectively by the Commodore Superintendent of the Woolwich Dockyard and the Secretary to the Board of Ordnance: the former having been granted to the person of whom the defendant purchased, the latter to the defendant himself.

Held, that these certificates, though not strictly in accordance with 9 & 10 Will. 3, c. 41, ss. 2, 4, were, nevertheless, an answer to the charge.

THE defendant was indicted under the stats. 39 & 40 Geo. 3, c. 89, s. 1, and 9 & 10 Will. 3, c. 41, s. 2. The indictment contained three counts, the first and second framed upon the former, the third upon the latter, statute. As, however, the evidence failed entirely upon the first two counts of the indictment, it is only necessary to advert to the third count, which charged the defendant with having in his possession a piece of canvass, several wooden

REG.
v.
WILLMETT.
—
*Possession of
naval stores—
9 & 10 Will. 3,
c. 41.*

(a) Reported by PAUL PARNELL, Esq., Barrister-at-Law.

R.R.O.
v.
WILLMETT.
—
*Possession of
naval stores,*
9 & 10 Will. 3,
c. 41.

blocks, some copper sheathing, and a number of nails and other old metal articles of small value, marked in the manner described in the act, the defendant not being a contractor with Her Majesty's principal officers or commissioners of the navy, ordnance, &c., or employed by such contractor, &c.

It appeared that the defendant was a marine-store dealer in a large way of business at Chatham, and the articles mentioned in the indictment were found in various parts of the defendant's shop and warehouse, mixed up with a number of other articles of a similar description which did not appear ever to have borne any government mark, or ever to have been government property. With respect to the piece of copper sheathing, which was valued at about 2s. 6d., it appeared from the evidence of the defendant's foreman, (who was called upon the part of the prosecution), that it had come to the defendant's warehouse doubled up in a small compass and concealed in the middle of a bundle of rope-yarn and other matters, commonly called shakings, from some person at Sheerness, who had sent the bundle for sale. The witness stated that the bundle was bought by weight, that he himself weighed it, and that it weighed about three-quarters of a cwt., the price of which would be little more than 3s. 6d. He stated also, that the defendant was not present when the bundle was opened; that the piece of sheathing was thrown on one side, and as he believed had never been seen by the defendant.

At the close of the case for the prosecution,

M. Chambers and *Ballantine*, for the defendant, submitted that the prosecution had failed, there being no evidence that the defendant had knowingly and wilfully had the stores in his possession. They contended that the onus of showing fraud or misconduct upon the part of the defendant lay on the prosecutors; that here the first presumption was in the defendant's favour, inasmuch as he was a marine-store dealer, carrying on a trade well known to the law and regulated by special acts of Parliament, and the articles found upon his premises, and in respect of which he was indicted, were very old and of small value, and such as in the course of his trade would come to him in a regular and legal way. They referred to an anonymous case in *Foster's Cr. L.* 439, and to *R. v. Banks*, 1 Esp. 145.

COLTMAN, J. thought that it was a question for the jury whether the defendant knowingly had in his possession marked stores without legal excuse.

M. Chambers then addressed the jury, and insisted that it was essential that the prosecutors should make out that the defendant could not have come by the stores honestly, and that the question for them to consider was, whether the defendant came to the possession of the stores without any fraud or misbehaviour on his part.

Petersdorff and *C. Pollock*, for the Crown, intimated that they should contend that under this statute the jury were bound to convict the defendant, if the stores were found in the possession and under the control of the defendant, unless he produced a certificate

in conformity with stat. 9 & 10 Will. 3, c. 41, s. 4. They mentioned that the Recorder of London had so ruled in several unreported cases tried at the Central Criminal Court.

COLTMAN, J.—The reported case in *Foster* is upon this very statute. It is unsafe to rely upon the mere recollection of unreported cases. The jury must say whether the marked stores were in the defendant's possession knowingly.

Several witnesses were then called in support of the defence. The evidence of some of them was to the effect, that in government sales, both by the Admiralty and the Ordnance, nails and other pieces of metal of small value, and blocks, such as those included in the indictment, were frequently sold, mixed up with other articles, and without any certificate being given by the commissioners; and some express evidence was given that the canvass mentioned in the indictment had been sold (with other articles) from the Woolwich Dockyard to a person named Ledger, and by Ledger sold to the defendant. Upon the sale to Ledger a certificate had been granted him, not under the hand and seal of three commissioners of the navy, as required by 9 & 10 Will. 3, c. 41, s. 4, but signed by Commodore Sir James J. G. Bremer, K.C.B., K.C.H., superintendent of the Woolwich Dockyard. Ledger had not given any certificate under his own hand or seal to the defendant. Further evidence was given to show that some of the small metal articles had been purchased by the defendant at a sale made by the authority of the Board of Ordnance, and a certificate was produced for these, signed by Richard Byham, secretary to the Board of Ordnance, but not under the hand and seal of three principal officers or commissioners, as required by the act.

Petersdorff replied generally for the Crown, and with regard to these certificates, called upon the jury to reject them, as furnishing no legal answer to the indictment, inasmuch as they did not amount to the only excuse allowed by the statute.

COLTMAN, J. to the jury.—The only question for you now is, as to the property found upon the defendant's own premises. A man is not criminally responsible for the acts of his servants, and if his servants improperly receive into his warehouse articles marked with the broad arrow, without his knowledge, he is not responsible. If the defendant himself purchased any of these articles, to which the certificates do not apply, knowing them to be marked with the broad arrow, then he is liable to be convicted, but not otherwise. Unless the goods were upon his premises with his knowledge, they were not in his possession at all. The account given of the sheathing, if true, illustrates what I say, that it is not everything found upon the defendant's premises which can be said to be in his possession. With regard to the two certificates, although they are not strictly in conformity with the act, the Government ought not to dispute their validity. If they apply to any part of these stores, so far as they apply they justify the possession by the defendant, and you ought not to be asked for a conviction in spite of them. With regard to the other articles, the question is, had the defendant

Rao.
v.
WILLMETT.

Possession of
naval stores,
9 & 10 Will. 3,
c. 41.

Judgment.

REG.
v.
WILLMETT.

possession of them, that is, was he aware of them? If you think that it is not proved that he knew they were there, or that it is not proved that he knew they were marked with the broad arrow, it will be your duty to acquit him.

Verdict—Not guilty.

CENTRAL CRIMINAL COURT.

DECEMBER SESSION, 1847.

December 18.

REG. v. LEONARD. (a)

False pretences—Evidence—Indictment.

On an indictment for false pretences, it was proved that the prisoner was foreman to the prosecutor, and that as such foreman it was his duty to keep an account of the work done by the men, and to obtain at the end of the week a cheque from his master for the sum due to the men for wages, and pay them accordingly. On the day in question he demanded and received a cheque for a larger amount than the correct one, alleging that such larger amount was due, and he appropriated the balance to his own use.

Held, that the evidence supported the charge.

Quære whether an indictment which charges the defendant with having obtained an order for the payment of money with intent to cheat and defraud the prosecutor of part of the proceeds of the same is within the 7 & 8 Geo. 4, c. 29, s. 53?

REG.
v.
LEONARD.

*False
pretences.*

THE first count of the indictment alleged, that the said John Leonard was in the service and employment of one Eli Richards, and that it was the duty of the said John Leonard, as such servant, to keep and render to the said Eli Richards, a true and correct account of the work done and performed by divers workpeople employed by the said Eli Richards, in the way of his business; and that the said John Leonard, being an evil-disposed person, and contriving and intending to cheat and defraud the said Eli Richards of his moneys and property, on the 12th of November, 1847, with force and arms, at the parish aforesaid, and within the jurisdiction of the said court, unlawfully and knowingly did falsely pretend to the said Eli Richards, that the account kept by him the said John Leonard, of the work done by divers workpeople in the service of the said Eli Richards, during the week

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

ending on the 12th of November, then instant, was a true and correct account of the work done by them for and on account of the said Eli Richards, and that the sum of 14*l.* 1*s.* 2*d.* was due in respect of work performed for and on account of the said Eli Richards during the said week, by means of which said false pretences the said John Leonard did then and there unlawfully and fraudulently obtain of and from the said Eli Richards an order for the payment of money, to wit, for the payment and of the value of 14*l.* 1*s.* 2*d.*, the property of the said Eli Richards, with intent to cheat and defraud him of the same. Whereas the account kept by him, the said John Leonard, of the work done by divers work-people in the service of the said Eli Richards during the week ending on the 12th of November then instant, was not a true and correct account of the work done by them for and on account of the said Eli Richards. And whereas the sum of 14*l.* 1*s.* 2*d.* was not then due in respect of work performed for and on account of the said Eli Richards during the said week against the form of the statute, &c.

REG.
v.
LEONARD.
*False
pretences.*

2nd Count.—That the said John Leonard being such servant ^{2nd count.} and such being his duty as in the first count mentioned, afterwards, to wit, on the 19th of November, in the year aforesaid, with force and arms, &c., unlawfully and knowingly did falsely pretend to said Eli Richards, that the account kept by him, the said John Leonard, of the work done by the said William Triplett during the week ending on the said 19th of November, was a true and correct account of the work done by him, the said William Triplett, for and on account of the said Eli Richards, and of the money due to him, the said William Triplett, and that the said William Triplett was entitled to the sum of 1*l.* 4*s.* 3*d.* for the work performed by him for and on account of the said Eli Richards during the said last-mentioned week, by means of which said false pretences in this count mentioned, the said John Leonard did then and there unlawfully and fraudulently obtain of and from the said Eli Richards one order for the payment of money, to wit, for the payment and of the value of 16*l.* 12*s.* 3*d.* the property of the said Eli Richards, with intent to cheat and defraud him of part of the proceeds thereof, to wit, of the sum of 6*s.* 6*d.* Whereas the said last-mentioned account kept by the said John Leonard of the work done by the said William Triplett, during the week ending on the said 19th of November, was not a true and correct account of the work done by him for and on account of the said Eli Richards, and of the money due to the said William Triplett. And whereas the said William Triplett was not entitled to the sum of 1*l.* 4*s.* 3*d.* for the work performed by him the said William Triplett, for and on account of the said Eli Richards during the said last-mentioned week, against the form of the statute in such case made and provided.

3rd Count.—That the said John Leonard being such servant, and ^{3rd count.} such being his duty, as in the first count mentioned, afterwards, to wit, on the 26th day of November, in the year aforesaid, with

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v.
LEONARD.

False
pretences.

force and arms, &c., unlawfully and knowingly did falsely pretend to the said Eli Richards that the account kept by him, the said John Leonard, of the work done by the said William Triplett and one Benjamin Triplett during the week ending the said 26th of November, was a true and correct account of the work done by them, the said William Triplett and Benjamin Triplett, for and on account of the said Eli Richards, and of the money due to them, the said William Triplett and Benjamin Triplett; and that the said William Triplett and Benjamin Triplett were entitled to the sum of 2*l.* 1*s.* for the work performed by them for and on account of the said Eli Richards during the said last-mentioned week, by means of which said false pretences in this count mentioned, the said John Leonard did then and there unlawfully and fraudulently obtain of and from the said Eli Richards an order for the payment of money, to wit, of the value of 14*l.* 16*s.* 7*d.* the property of the said Eli Richards, with intent to cheat and defraud him of part of the proceeds thereof, to wit, of the sum of 8*s.* 9*d.*; whereas the said last-mentioned account kept by him, the said John Leonard, of the work done by the said William Triplett and Benjamin Triplett during the week ending on the said 26th of November, was not a true and correct account of the work done by them, for and on account of the said Eli Richards, and of the money due to the said William Triplett and Benjamin Triplett; and whereas the said William Triplett and Benjamin Triplett were not entitled to the sum of 2*l.* 1*s.* for the work performed by them, the said William Triplett and Benjamin Triplett, for and on account of the said Eli Richards, during the said last-mentioned week, against the form of the statute in such case made and provided.

The 4th count was to the same effect.

It was proved upon the trial that the prosecutor engaged the prisoner as foreman over the men employed by him, and that it was the prisoner's duty to keep an account of the work the men performed, and of the wages due to them, and on the Friday in each week to lay before the prosecutor an account, showing the amount earned by each workman, upon which the prosecutor gave him a cheque upon his bankers for the total sum so shown to be due to the several workpeople for the week's work. In support of the first count it was proved that the prisoner made out and produced to the prosecutor an account, by which it appeared that the total amount due and payable on the 12th of November, was 14*l.* 1*s.* 2*d.*, and that the sum included a false charge of 7*s.* which was not in fact due.

That the prosecutor, confiding in the accuracy of the account, gave the prisoner a cheque for 14*l.* 1*s.* 2*d.* which the prisoner immediately cashed, and applied the said sum of 7*s.* to his own use, but properly disposed of the remainder.

The second count was supported by similar evidence, and had reference to a cheque of 16*l.* 12*s.* 3*d.* obtained by the prisoner on the 19th of November, out of which he applied to his own use the sum of 6*s.* 6*d.* falsely stated in his account to be due to one

William Triplett, the prisoner applying the remainder of the proceeds properly in payment of the workmen to whom the respective sums charged were due. Evidence was also given in support of the third and fourth counts.

Ballantine, for the prisoner, submitted that under the first count the evidence did not disclose any offence within the 7 & 8 Geo. 4, c. 29, s. 53, and that under the second, third, and fourth counts the prisoner could not be convicted, inasmuch as the act stated that whoever should receive any valuable security with intent to cheat and defraud the owner of the *same*, should be subject to a certain punishment. Here the proof was of an intent to cheat the prosecutor of only *a portion of the sum* received.

Bodkin, for the prosecution having replied, the Recorder declined to stop the case, but reserved the points for the consideration of the judges.

The prisoner was convicted, and the case having been referred to the fifteen judges, the following communication was, in the last June Session, received from Mr. Justice Williams by the learned Recorder:—

“The case of *The Queen v. John Leonard*, came under the consideration of the judges on Saturday last, on the point reserved by you for their consideration.

“They were unanimously of opinion that the conviction was right. But as to all the counts, except the first, the judges entertained some doubt whether an objection might not be maintainable in respect of the intent being laid to defraud the prosecutor of part of the valuable security (the statute using the words ‘obtain, &c., any valuable security with intent to cheat or defraud any person of the same.’) The judges, therefore, suggest to you the propriety of passing a sentence on the first count separately, and of afterwards adjudging separately a punishment on the subsequent counts, to endure for a period of time concurrent with, and not exceeding the duration of punishment adjudged in respect of the first count.”

REG.
v.
LEONARD.
—
*False
pretences.*

CENTRAL CRIMINAL COURT.

July 7, 1848.

(Before the LORD CHIEF JUSTICE WILDE.

REG. v. SHARPE.(a)

Riot.

If persons are assembled together to the number of three or more, and speeches are made to those persons to excite and inflame them, with a view to incite them to acts of violence, and if that same meeting is so connected, in point of circumstances, with a subsequent riot that you cannot reasonably sever the latter from the incitement that was used, those who incited are guilty of the riot, although they are not present when it occurs.

REG.
v.
SHARPE.
Riot.

THE defendant was indicted for sedition, and also for riot. It was proved that, about three or four o'clock on the day in question, he had addressed a very large assemblage of persons in the neighbourhood of Bishop Bonner's fields, and had used very exciting and inflammatory language. At the close of his speech he begged the assembly to meet again at five o'clock, when he would again address them. The second meeting took place, and defendant spoke and went away. The mob shortly afterwards dispersed in different directions; but a large party of them moved towards a church, in which several policemen had been stationed, and they began throwing stones, and conducting themselves in a very violent manner. The defendant was not seen upon the ground after he had spoken the second time.

Wilkins, Serjt. (with him *B. C. Robinson*), for the defendant, contended that, under these circumstances, he could not be convicted of the riot.

WILDE, C. J. (in summing up).—If persons are assembled together to the number of three or more, and speeches are made to those persons to excite and inflame them, with a view to incite them to acts of violence, and if that same meeting is so connected, in point of circumstances, with a subsequent riot, that you cannot reasonably sever the latter from the incitement that was used, it appears to me that those who incited are guilty of the riot, although they are not actually present when it occurs. I think it is not the hand that strikes the blow, or that throws the stone, that is alone guilty under such circumstances; but that he who inflames people's minds, and induces them, by violent means, to accomplish an illegal object, is himself a rioter, though he take no part in the riot. It will be a question for the jury, whether the riot that took place was so connected with the inflammatory language used by the defendant, that they cannot reasonably be separated by time or by other circumstances.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

NORTHERN CIRCUIT.

NEWCASTLE SPRING ASSIZES, 1849.

(Before BARON ALDERSON.)

REG. v. ANN DIXON.(a)

Uttering a forged "warrant and order."

ged authority to draw money, which is well described as a "warrant," is not an "order" for the payment of the money, and an indictment describing such a forged authority for the payment of money as "a warrant and order," is bad.

this case the prosecutor, who resides at Newcastle-upon-Tyne, had deposited a sum of 26*l.* 16*s.* 9*d.* in the Newcastle-upon-Tyne Savings Bank. His sister, the prisoner, who was aware of this, filled up a Savings Bank cheque, without her brother's authority, and drew out this money. The cheque was as follows:—
 August 16th, 1848. Gentlemen, I do hereby authorize the bearer of this note to draw the money that you now hold belonging to me, WM. STOKER." The prisoner was indicted for uttering, and also for uttering, this cheque, as a "warrant and order," under the statute 1 Will. 4, c. 66, s. 3. (b) The indictment was in the following form:—

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v.
ANN DIXON.
—
Forged
"warrant or
order."

Town and County of Newcastle-upon-Tyne } The jurors for our lady the Queen
 upon their oath present, that Ann
 to wit. } Dixon, late of the parish of Saint
 Nicholas, in the town and county of Newcastle-upon-Tyne, wife
 of John Dixon, labourer, on the 26th day of August, in the
 year of our Lord, 1848, at the parish aforesaid, in the town and
 county aforesaid, feloniously *did forge a certain warrant and order*
for the payment of money, which said forged warrant and order
for the payment of money is as follows, that is to say, "August
1848. Gentlemen, I do hereby authorize the bearer of
a note to draw the money that you now hold belonging to me,
WM. STOKER," with intent to defraud the said William
Stoker, against the form of the statute in such case made and
enacted, and against the peace of our said lady the Queen, her
honour and dignity: and the jurors aforesaid, upon their oath
said, do further present that the said Ann Dixon, on the day
ear aforesaid, at the parish aforesaid, in the town and county
said, feloniously did offer, utter, dispose of, and put off, a
an other forged warrant and order for the payment of money,

Indictment.

(a) Reported by T. CAMPBELL FOSTER, Esq., Barrister-at-Law.

(b) See decisions on this point, 2 Russ. by Greaves, p. 515.

REG.
v.
ANN DIXON.
—
Forged
"warrant or
order."

which said *forged warrant and order* for the payment of money is as follows, that is to say, "August 16th, 1848. Gentlemen, I do hereby authorize the bearer of this note to draw the money that you now hold belonging to me, WILLIAM STOKER," with intent to defraud the said William Stoker, she, the said Ann Dixon, at the time she so uttered and published the said last-mentioned forged warrant and order for the payment of money as aforesaid, then and there well knowing the same to be forged, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity: and the jurors aforesaid, upon their oath aforesaid, do further present, that the said Ann Dixon, on the day and year aforesaid, at the parish aforesaid, in the town and county aforesaid, feloniously did offer, utter, dispose of, and put off, a certain other forged warrant and order for the payment of money, with intent to defraud Thomas Fenwick and others, she, the said Ann Dixon, at the time she so uttered and published the said last-mentioned *warrant and order* for the payment of money as aforesaid, then and there knowing the same to be forged, against the form of the statute, &c.

ALDERSON, B.—The indictment is bad, because the instrument set out is a warrant and not an order. Every order is a warrant, but every warrant is not an order. This is a warrant and not an order; and the indictment states it in each count to be "a warrant and order." But I will consult my brother Coleridge about it. On his return his lordship said,—My brother Coleridge is clearly of opinion that this is not an order. The prisoner must be discharged. (a)

Lush for the prosecution; *Granger* for the prisoner.

(a) The 3rd section of the statute, 1 Will. 4, c. 66, enacts, "that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary writing, or any bill of exchange, or any promissory note for the payment of money, or any indorsement on, or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, *warrant, or order* for the payment of money, with intent, in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

CENTRAL CRIMINAL COURT.

JULY SESSION, 1848.

(Before LORD CHIEF JUSTICE WILDE, MAULE, J., and
PARKE, B.)

REG. v. FUSSELL.(a)

Sedition—Quashing indictment—Variance—Evidence.

Where an indictment contained counts for sedition, attending a seditious meeting and a riot, the court refused to quash the indictment, or compel the counsel for the prosecution to elect, although the judgment on the last count might be different from that upon the others.

The words set out in an indictment for sedition were these, "If the Queen neglects to recognize the people, then the people must neglect to recognize the Queen." It was proved that the word "forget" was used in both instances, and not "neglect." Held to be a fatal variance as far as that sentence was concerned, and that the passage must be struck out.

The indictment contained these words, "If John Mitchel is sent out of his country every Irishman must rise and avenge the insult or you will be no longer worthy of the name." Instead of the word "you," the word "they" was proved to have been used.

Held that the words "or you will be no longer worthy of the name" must be struck out; but, as the former part of the sentence was complete in itself, uncontrolled by that which came after, and contained what substantially amounted to sedition, it might stand.

The indictment charged the following words:—"The Government is not worthy the support of any honest man; it is too contemptible to be recognized, and you must use your best endeavours to overthrow it. And now, I wish to impress upon you, there is one safe way of getting rid of rulers." It was proved that the word "bad" had been used immediately preceding the last word "rulers."

Held, that the variance was immaterial.

Where a witness for the prosecution has given an account of what was said by the defendant at a particular transaction, and a witness is called for the defence to give a different one, it is not allowable for the defendant's counsel to put to him the precise words used by the first witness, and ask if they were uttered; but the witness should be called upon in the first instance to give his version of the matter, and when he has so done, he may be asked whether this or that expression was used.

THE defendant was indicted for making a certain seditious speech. There were other counts, charging him with attending an unlawful assembly, and a count for a riot. When the defendant was called on to plead,

Allen, Serjt. (with whom was Huddleston for the defendant), applied to the court either to quash the indictment or to put the

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—
Sedition—
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(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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Motion to quash
the indictment.

counsel for the crown to an election on which count they would proceed. It was conceded that, in general, several counts in misdemeanor might be joined in one indictment, but that was subject to the proviso, that the judgment would be the same on each. Here the judgment would be different, for the court had power, under the 3 Geo. 4, c. 114, to sentence a defendant convicted of a riot to hard labour, and this could not be done under the other counts. The principle upon which the rule contended for rests, is that a multiplicity of charges in the same indictment tends to embarrass the defendant, and therefore the court will interfere for his protection. *R. v. Young*, 3 T. R. 98, is an authority in point. There Buller, J. says, "but if it appear, before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury, for he might object to a jurymen trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to his election on which count he will proceed. I did it at the last sessions at the Old Bailey." The distinction was recognized in *R. v. Johnson*, 3 Maule & Sel. 549.

PARKE, B.—That was a case of felony, and Mr. J. Buller's dictum has reference to a felony.

Allen, Serjt., submitted that the principle was the same in misdemeanors as in felonies. No other criterion was suggested than this, "would the judgment be the same?" Here one set of counts are framed at common law—another under statute law, and the punishment is different. *R. v. Kingston*, 8 East, 46, was a case of misdemeanor, in which different offences were joined in one indictment. There the objection was taken by demurrer, which was overruled, but Lord Ellenborough, C. J., said, "this would have been a good ground of application to the discretion of the court to quash the indictment for the inconvenience which may arise at the trial from joining different counts against different offenders; but where, to the offences so charged in different counts, there may be the same plea, and the same judgment, there is no authority for saying that such joinder in one indictment is bad in point of law." *R. v. Towle*, 2 Marshall, 466, was also cited.

The *Attorney General* (with whom were *Welsby*, *Bodkin*, and *Clerk*, for the prosecution), were not called upon.

WILDE, C. J.—(After consulting PARKE, B., and MAULE, J.)—It does not appear to us that this is a case in which we can interfere in the way suggested by the learned counsel for the defendant. Whether any particular form of indictment will or will not have the effect of embarrassing the person accused, must be judged of from the nature of the charges which are contained in the different counts. It cannot be contended that there is such an objection on the face of the indictment as would furnish ground

for a demurrer. It charges seditious speaking, attending an illegal meeting, and a riot. Now that may be all one transaction; the meeting may have been illegal,—there may have been seditious speaking, and the proceedings may have gone far enough to constitute a riot. One of my learned brethren has mentioned a case in point, and which was tried before him;—a man was charged with wounding nine cows; he had done it at one and the same time, and in the same stable. He was arraigned on nine different counts, and it was contended that there were nine offences, but the learned judge refused to interfere because it was all part of one and the same transaction, and had no tendency, therefore, to embarrass the defendant in his defence. So here the presumption on looking at the charges is, that they all originate in one set of circumstances. Fully admitting, therefore, the propriety of interfering where a defendant is likely to be unfairly endangered by the mode in which he is indicted, we all think, in the absence of any specified hardship or difficulty, we ought to refuse the defendant's application.

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Indictment.

The defendant then pleaded *not guilty*, and the case proceeded. At the close of the evidence for the prosecution,

Allen, Serjt. submitted that there were several variances between the record and the evidence which were material. It is charged in the indictment that the defendant says, speaking of John Mitchel, "I now ask the same question and adopt his views; if the Queen *neglects* to recognize the people, then the people must *neglect* to recognize the Queen." The evidence is that the word, in both instances, was *forget* and not *neglect*. This totally alters the sense of the passage, and therefore is a material variance. Variances.

PARKE, B.—No doubt you must prove some of the precise words, but the question is whether that part where the variance occurs may not be rejected.

Allen, Serjt.—Then it is alleged in the indictment that these words were used,—“If John Mitchel is sent out of his country every Irishman must rise and avenge the insult or *you* will be no longer worthy of the name.” The evidence is that “*they*” was the word used instead of “*you*.” It is obvious that this is very material; the words in the indictment imply that he intended to stir up and incite those whom he was addressing: substitute the word *they*, and it might be a mere passing observation as to some other persons living in another country.

MAULE, J.—But it was stated by the witness that those the defendant was addressing were principally Irish, so that *you* and *they* would amount to much the same thing.

Allen, Serjt.—Then the indictment charges these words to have been used,—“The government is not worthy the support of any honest man; it is too contemptible to be recognized, and you must use your best endeavours to overthrow it; and now I wish to impress upon you there is one safe way of getting rid of rulers.” The evidence is that the words were “getting rid of *bad* rulers.” These the learned counsel contended were material variances and vitiated the indictment.

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The *Attorney General* submitted that the alleged variances were immaterial; or if it were otherwise, those particular parts might be rejected and the remainder might be submitted to the jury as amply sufficient to sustain the various counts.

Judgment as to
the variances.

WILDE, C. J.—(After consulting the other judges.)—The rule that has been suggested is no doubt the correct rule. When the indictment sets forth certain specific matter, which is charged to be sedition, it is essential that so much of that matter shall be proved as will support the charge; it is quite immaterial that a portion is unproved if there is enough left substantially to constitute sedition. Now, as to the first sentence in which variance is alleged,—“If the Queen *neglect* to recognize the people, then the people must *neglect* to recognize the Queen,” there is scarcely any word which could be omitted without destroying the sense of the passage. To substitute the word *forgets* for *neglects* would too far alter its meaning, and I think, therefore, that that sentence must be considered as struck out of the indictment.

The next alleged variance is where the pronoun “you” is in the indictment, and “they” is proved. The first portion of the sentence is this, “If John Mitchel is sent out of his country every Irishman must rise and revenge the insult,” that is literally proved; and it goes on “or *you* will no longer be worthy of the name.” The first part is a sentence complete in itself, and contains seditious matter, and the question is whether it may not be separated from the latter part where the variance occurs, and which must, no doubt, be rejected. We think it may, for the latter clause in no way controls or affects the former. Suppose the defendant had not been charged with using the latter words at all, surely the indictment would not be objectionable on that account. It does not profess to charge all that was said; it selects certain matter, which it charges to be seditious, and what is charged to be seditious is not the less so because additional seditious matter is proved which is not charged. We think, therefore, that the former part of the sentence may stand, but that the latter must be rejected. The last objection is that in the passage, “there is one safe way of getting rid of rulers who forget their duty to their country,” the word “*bad*” is proved to have been used before “*rulers*.” It does not appear to us that that word at all alters the meaning of the sentence. The defendant is proved to have uttered all that he is charged with and something more, but this something, although it may render the expression stronger and more cogent, does not vary the sense. If, on the contrary, it had qualified or lessened it, the objection might have been a good one. As it is, we are bound to hold that the variance is immaterial.

Evidence.

In the course of the defendant's case, *Huddleston* asked one of his own witnesses whether the defendant had made use of certain expressions—(putting to him the very words used by a witness for the prosecution)—with a view to elicit from him a negative.

The *Attorney General* objected to the question on the ground of its being a leading one. This was not a case of ~~propounding a question~~ dictation, where a former witness had denied, on cross-examination,

that certain specific words were used, and subsequently another witness was called to prove them.

Huddleston.—Certain witnesses have come to speak to certain precise words, and pledge themselves that those words were uttered by this defendant. I call a witness to show that those expressions were not uttered, and, therefore, according to the ordinary rule, I am entitled to put into the witness's mouth the exact words to which the other witnesses have pledged themselves. The facts, no doubt, differ from those put by the Attorney-General, but the principle is the same.

WILDE, C. J.—Where one witness has given an account of a transaction, and another is called to give a different account, it is not the common rule to put to the second witness what the first has said, but to call upon him to give his version of the matter, and when he has so done, then to ask him whether this or that expression was not used.

PARKE, B.—It has always been held much the better way to ask what has been said. It cannot be tolerated that you should put the words into the mouth of the witness in the first instance.

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NORTHERN CIRCUIT.

LANCASTER ASSIZES, 1848.

February 16.

(Before Mr. BARON ALDERSON.)

REG. v. MARY CLEGG.(a)

Indictment for damaging a warp.

A warp not sized, but on its way to the sizers to be sized, to fit it for being used in manufacturing goods, is not a warp, "in any stage, process, or progress of manufacture," or "prepared for, or employed in, carding, spinning, &c." within the 7 & 8 Geo. 4, c. 30, s. 3, though the indictment is not bad for not averring it to be so.

MARY CLEGG was indicted (under the 7 & 8 Geo. 4, c. 30, s. 3) for having, at Great and Little Marsden, unlawfully damaged a cotton warp, the property of Margaret Walker.(b)

Segar and Blair conducted the prosecution, and *James and Pollock* defended the prisoner.

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v.
MARY CLEGG.
—
Damaging a
warp.

(a) Reported by T. CAMPBELL FOSTER, Esq., Barrister-at-Law.

(b) Arch. Crim. Pleading, 10th edit. 324.

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v.
MARY CLEGG.
—
*Damaging a
warp.*

Indictment.

The indictment was in the following form:—

Lancaster, to wit:—The jurors for our lady the Queen upon their oath present, that Mary Clegg, late of the parish of Warley, in the county of Lancaster, the wife of David Clegg, on the 17th day of January, A. D. 1849, with force and arms, at the parish aforesaid, in the county aforesaid, certain goods and articles of cotton, to wit, one cotton warp, of the value of 1*l*., of the goods and chattels of Richard Brown and another, his copartner; and one other cotton warp, of the value of 1*l*., of the goods and chattels of Margaret Walker; one other cotton warp, of the value of 1*l*., of the goods and chattels of John Nicholas Hopwood, the said goods and chattels respectively then and there being in a stage and progress of manufacture and then and there being found, unlawfully, maliciously, and feloniously did damage, by then and there pouring and throwing on the same warp a large quantity, to wit, one ounce of a certain corrosive and destructive acid, to wit, sulphuric acid, and by then and there, by and with the said acid, feloniously burning the said warps, so then and there being in a stage and progress of manufacture, with intent then and there feloniously to destroy the said warps, and to render the same useless, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

2nd count.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said Mary Clegg, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, certain goods and articles of cotton in a stage of progress of manufacture, to wit, one cotton warp, of the value of 1*l* of the goods and chattels of Margaret Walker then and there being, unlawfully, maliciously, and feloniously did damage, to wit, by pouring and throwing on the same last-mentioned warp, a certain large quantity, to wit, one ounce, of a corrosive and destructive acid, to the jurors aforesaid unknown, with intent then and there feloniously to destroy the said last-mentioned warp, to the great damage of the said Margaret Walker, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

3rd count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Mary Clegg, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, certain goods and articles of cotton, to wit, one cotton warp, of the value of 1*l*., of the goods and chattels of Margaret Walker, unlawfully, maliciously, and feloniously did burn, and destroy, and damage, with intent then and there feloniously to destroy the same, and to render the same useless, to the great damage of the said Margaret Walker, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

It appeared that the prosecutrix formerly carried on business as a warp sizer in partnership with David Clegg, near Colne, and after his death, the business was carried on by the prosecutrix

alone. It appeared that there had been some disputes between the Cleggs and Mrs. Walker after David Clegg's death. The prisoner lived at a place named Primett-bridge, at David Clegg's house, Primett-bridge being on the road between Settle and Colne. On the 17th of January last, Messrs. Brown and Co., who carry on business near Settle, as manufacturers, had occasion to send some warps to Mrs. Walker's to be sized; and James Hopwood, a carter, was sent with the warps. He had arrived as far as Primett-bridge about half-past nine in the evening, when he stopped there a short time to feed his horse, and left his cart and horse on the road whilst he went to get a horse-cloth. The evening was rather dark. On returning he saw a woman, whom he believed to be the prisoner, close to the cart's tail and he saw her enter Clegg's house. He then drove on. When he got to Broughton, he discovered that one of the "sheets" of warp was turned black, and he left it at Gargrave. This warp "sheet" appeared to have been destroyed by vitriol.

James submitted that on these facts the indictment would not lie under the statute (7 & 8 Geo. 4, c. 30, s. 3); these were goods on the road, and not in any "stage, process, or progress of manufacture," or "prepared for," or "employed in spinning," &c. They were not so prepared, as they required "sizing," and they were not "employed in any manufacture." The indictment charged the goods to be in "a stage and progress of manufacture." The goods were in the process of conveyance from one place to another, and could not be said to be under the first branch of the section of the act of Parliament on which the indictment was framed. Neither would the 3rd count of the indictment lie on the second branch of the section of the statute. The third count charged the prisoner with damaging a "cotton warp;" but the statute required it to be "prepared for," or "employed in carding, spinning, throwing, weaving, pulling, shearing, or otherwise manufacturing." This was not a warp "prepared for," any such process; it required "sizing," to enable it to be used in any manufacture. (a)

Blair submitted that the indictment was sufficient, and need

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(a) The following is the section of the statute:—"If any person shall unlawfully and maliciously cut, break or destroy, or damage with intent to destroy, or to render useless, any goods or articles of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work, knitted piece, stocking, hose, or lace, respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy, or to render useless any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit,) in addition to such imprisonment."

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—
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warp.*

not allege that the goods were "prepared for," or "employed in manufacture." He referred to the case of *Rex v. Ashton*, 2 B. & Ad. 750; in which case it was held by Lord Tenterden, in delivering the judgment of the Court of King's Bench, on a writ of error, "not to be necessary to allege specifically in the count that the warps therein mentioned were prepared for or employed in carding, spinning, weaving," &c. (a)

ALDERSON, B.—The goods damaged were warps sent to Brown and Co.'s to be sized, and before they arrived at the sizer's for the purpose of being sized, you charge them with being damaged.

Blair apprehended it was still an article "prepared for" manufacture, and was still in a "process of manufacture," requiring something to be done to it to complete it, and that it was within the meaning of the section.

ALDERSON, B.—The warp must be something altogether prepared for manufacture, and the proof must be of something completely prepared for manufacture. It may be that the third count is not bad for not stating the warp to be completely "prepared for" manufacture; but it is not sufficient without proof to support the want of that averment. He would, however, consult his brother COLERIDGE on the point.

On his return, his lordship said—We have considered the question, and both agree that the words "prepared for" and in process of manufacture must be considered as referring to the warp. We are both agreed that the warp is not a warp, unless it be prepared for, or used in a certain process of manufacture. His lordship having referred to and read the judgment in *Rex v. Ashton* (b) continued—I should be of opinion that, in order to bring the case within the statute, it will not do simply to prove any warp to have been damaged, except a warp damaged which was "prepared for," and in the process of manufacture of goods of this description. But, as there may be some doubt as to the facts, I think it better to take the opinion of the jury, how far this was a warp prepared for, or in the process of the manufacture of goods; as until it was what is called "sized," it is my impression that it was not such a warp, though called "a warp," in popular language. On these facts being found, if necessary, I will reserve the case.

The defence was, that there was a mistake in the identity of the prisoner.

The jury acquitted the prisoner.

(a) See 2 Russell, by Greaves, p. 586.

(b) *Ubi supra.*

CENTRAL CRIMINAL COURT.

JANUARY SESSION, 1849.

January 1.

REG v. PARKER.(a)

Notice of trial in misdemeanor.

Here a defendant is under recognizances to appear and take his trial at a particular session of the Central Criminal Court, no notice of trial to the prosecutor is requisite, and he is bound to be prepared to try at that session.

THE defendant was indicted for perjury, the indictment had been found at the last session, and the prosecutor had obtained process, but the writ was not executed, as the defendant, hearing at the indictment had been found, put in bail, and now appeared to take his trial.

Ballantine (for the prosecution) submitted that he was not bound to bring the case on. The prosecutor had not received any notice that the defendant would surrender, and was not therefore prepared with his witnesses. A notice was always required to be given when the defendant was out on bail, otherwise the prosecutor might be put to great and needless expense, by bringing down his witnesses when the defendant did not choose to appear.

Jones, Serjt., (with whom was *Prentice*, for the defence,) contended that the defendant being bound over to appear at the session, was entitled to demand a trial. If he did not appear, his recognizances might be estreated, and the prosecutor might therefore fairly assume that he would be present in court, and should himself be prepared to enter upon his case.

Ballantine said that the practice had always been otherwise, and at it would be very desirable that some rule should be laid down on the subject.

THE RECORDER.—It seems to me that there is no ground now requiring such notice to be given. It was otherwise when a defendant out on bail might have traversed, and had thus the option of postponing his trial. That right is now taken away, as far as this court is concerned, and I think it no longer requisite that a man should give notice that he would comply with a law, the evasion of which would subject him to penalties. I consider a man on bail to be in custody of the law, and if he would be entitled to claim a trial if in actual custody, he is not deprived of that right because he is under recognizances to surrender. It would be a hard case if the defendant were held bound to appear, while the prosecutor was to have the chance of appearing or not at his pleasure. When he obtained process he undertook to prosecute with effect, and must be prepared to do so. I think it right therefore to lay down the rule, that under such circumstances no notice is necessary.

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PARKER.
—
Practice—
Notice of trial
in
misdemeanor.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

CROWN CASE RESERVED.

January 20, 1849.

Before LORD DENMAN, C.J., PARKE, B., ALDERSON, B.,
COLERIDGE, J., and COLTMAN, J.

REG. v. WATERS.(a)

Murder—Manslaughter—Description of deceased.

In an indictment for murder, the first count alleged, that the prisoner, "in and upon a certain infant female child, born of the body of her the said Sarah Waters, of tender age, to wit of about the age of two days, did make an assault," &c., and went on to state a murder by poisoning.

The 2nd count charged an assault, "in and upon the said infant female child, so born of the body of her the said Sarah Waters," &c. and then set forth the cause of death to have been the exposing the child on a heap of ashes, leaving it there exposed to the inclemency of the weather. But there was no allegation in this count of the child's age, or that it was of tender years, so that the natural consequence of the exposure would be its death.

Held, nevertheless, that the 2nd count was good after verdict.

Held, also, that describing the child in the indictment as "not named," was not matter of objection.

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—
Murder—
Indictment.

THE following case was reserved by Mr. B. ROLFE:—The prisoner was tried before me at the last December session of the Central Criminal Court, on charge of murder.

The first count of the indictment charged that the prisoner, "in and upon a certain infant female child, born of the body of her the said Sarah Waters, and of tender age, to wit of about the age of two days, and not named," feloniously, and of her malice aforethought, did make an assault, and it then goes on to charge that she caused the child to take poison, and so murdered her.

The second count of the indictment was as follows:—

2nd Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Sarah Waters, afterwards, to wit on the day aforesaid, and in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, in and upon the said infant female child, so born of the body of her the said Sarah Waters, and not named as aforesaid, in the peace of God, and our said Lady the Queen, then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault, and that she, the said Sarah Waters, with both her hands, the said infant female child, in and upon a certain heap of dust and ashes there situate, and

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

being in the open air, there feloniously, wilfully, and of her malice aforethought, did cast and throw, and that the said Sarah Waters feloniously, wilfully, and of her malice aforethought, did then and there leave the said infant female child in and upon the said heap of dust and ashes, in the open air, there as aforesaid, exposed to the cold air for a long space of time, to wit for the space of twelve hours, by means of which said exposure to the cold air, as aforesaid, the said infant female child became mortally chilled, benumbed, and frozen in her body, of which said exposure to the cold air, and of the mortal chilling, benumbing, and freezing in her body, thereby occasioned, the said infant female child then and there died, and so the jurors aforesaid, upon their oath aforesaid, do say that the said Sarah Waters, the said infant female child, in manner and form last aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace of our said Lady the Queen, her crown and dignity. The prisoner was also charged on the coroner's inquisition, which charged—

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WATERS.
—
Murder—
Indictment.

That Sarah Waters, late of the parish of St. Mary, White-chapel, in the county of Middlesex, on the 21st day of November, in the year aforesaid, at the parish last aforesaid, in the county aforesaid, the said female child from her body, by the providence of God did bring forth alive, and that the said Sarah Waters, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil afterwards, to wit on the 22nd day of November, in the year aforesaid, at the said parish of St. George, Hanover-square, in the said liberty, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, in and upon the said female child, so alive, and in the peace of God, and of our said Lady the Queen, then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault, and that the said Sarah Waters, the said female child so being alive, then and there did take and carry to a certain dung-hole, in a certain mews there situate, and the said female child so being alive, then and there feloniously, wilfully, and of her malice aforethought, in the said dung-hole, did hide, secrete, and conceal, and the said female child so being alive, and so being hidden, secreted, and concealed, she, the said Sarah Waters, then and there feloniously, wilfully, and of her malice aforethought, did desert and leave exposed to the inclemency of the weather; and the said female child so being alive, and so being hidden, secreted, and concealed, to nourish, sustain, and support, she, the said Sarah Waters feloniously, wilfully, and of her malice aforethought, did then and there wholly neglect and refuse. By means of which said hiding, secreting, concealing, and deserting, and leaving exposed to the inclemency of the weather, of the said female child, by the said Sarah Waters, and also by reason of the said neglect and refusal of the said Sarah Waters, the said female child to nourish, sustain and support, the said female child then and there instantly died; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said Sarah Waters, her the said female child, in manner

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and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder against the peace of our said Lady the Queen, her crown and dignity.

At the trial, the jury found the prisoner guilty of manslaughter, on the 2nd count only of the indictment, and also on the coroner's inquisition.

A motion was made in arrest of judgment, on the ground that the 2nd count of the indictment stated no crime. The age being laid under a *videlicet*, it is consistent with all which is stated in the count, that the child might be of the age of twenty years, and capable of taking care of herself, and so able to have prevented the ill effects of the exposure which is the sole cause of the death alleged. I thought the objection good, and I did not think it safe to rely on the coroner's inquisition, because the name of the child is not there stated, nor any reason given for its omission, and even in the indictment it seems to me doubtful whether the statement that the child had not *been named* is sufficient to dispense with the statement of its name, for *non constat* that it might not have acquired a name by reputation.

Case.

As to the necessity of stating the name, see *Reg. v. Biss*, 2 Moo. 93, and *Reg. v. Shond*, 2 Moo. 270.

I have to request the opinion of the judges whether either the 2nd count of the indictment, or the coroner's inquisition are sufficient to warrant a judgment for manslaughter.

Clerk (with whom was *Bodkin* for the prosecution).—First, as to whether the child's age is sufficiently referred to in the 2nd count. This case differs from *R. v. Martin*, where it was held that a statement of age being necessary, the words, the "said E. R.," in the 2nd count was not sufficient; as referring to the full description in the first: here the words, "so born as aforesaid," carry the description further.

COLERIDGE, J.—"So born" means so born of the body, but has no reference to age.

Clerk.—I contend, moreover, that it is immaterial what age the child is of, if the act charged is alleged to have caused the death, and that is so here.

ALDERSON, B.—The death of the child is caused by two acts, the throwing it on the ashes, and the leaving it there. Both must be unlawful to support this charge. But how is it unlawful to leave a grown person under such circumstances? You must import into the charge the tender age of the child to make the leaving it there a felony.

Clerk.—Then as to the name—

LORD DENMAN, C. J.—We have no doubt about that. As to the other question we will reserve our judgment upon it.

January 30.

PARKE, B. delivered the following judgment:—

If the 2nd count in the indictment had charged the prisoner with causing the death of the deceased by a mere nonfeasance,

the neglect of her maternal duty towards her child, it would have been bad, because the indictment ought to have stated the child to have been of such an age, or in such a situation as to be unable to take care of itself. Supposing an averment that the child was of tender years would have imported such an inability, there is no averment in this count that the child was of tender years, for the reference, in the commencement of it, to the first count, does not import that description. It contains no more than an averment, that the child was an infant female child, born of the prisoner's body, and not named. (See opinion of Mr. Justice Patteson, *Reg. v. Martin*, 6 C. & P. 217.)

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But this count charged the prisoner with a misfeasance, a wrongful act in assaulting the child, and casting and throwing her on a dust-heap, and if the death of the child is traced to this act, the offence of manslaughter is complete. Is it then traced to this wrongful act? It is alleged that the prisoner having cast and thrown the deceased on the heap of dust, left her there, that is, permitted her to continue there, exposed to the cold air, by means of which exposure she was benumbed and died. The exposure, therefore, is charged against the prisoner, and the death is attributed to the exposure.

It is not expressly averred in this case, that the child was of such tender years, or so feeble that she could not walk away and take care of herself; but that is implied, for if she had been sufficiently old, or strong to do so, the death would not have arisen from the exposure by the prisoner, but from the act of the child in not walking away and taking care of herself.

Thus, it is established, that if, in an action on the case, a neglect is charged against the defendant, by reason whereof the plaintiff had sustained damage, the question whether the plaintiff could have avoided that damage by the exercise of ordinary care, is always open on not guilty; and after verdict, it is presumed that the jury have found the fact of the neglect, and also found that the consequential damage was not caused by the want of ordinary care in the plaintiff: (*Bridge v. Grand Junction Railway Company*, 3 M. & W. 248; *Goldthorpe v. Hardman*, 13 M. & W. 377; and 14 L. J., N. S., Exc. 61.) In this case the jury could not have found the prisoner guilty, without actually negating the power of the child take care of herself, and escape the consequences of the unlawful act of the prisoner, and consequently after verdict that fact must be implied, I think therefore the count is good in this respect.

A doubt occurred to the learned judge whether the description of the child, as being "not named," was sufficient. "Not baptized" would not have been enough, but "not named," which means that she had acquired no name, either by baptism or usage, appears to be quite sufficient.

Conviction affirmed.

NORFOLK CIRCUIT.

BUCKS SPRING ASSIZES, 1849.

Aylesbury, March 6.

(Before Mr. BARON ROLFE).

REG. v. TURNER AND OTHERS. (a)

Night poaching—Then and there—Armed—9 Geo. 4, c. 69, s. 9.

An indictment under the 9 Geo. 4, c. 69, charged, that the prisoners "were in the Great Ground on the 11th February, armed with intent, then and there, to take game." The evidence showed that the prisoners were all seen, for the first time, in the Great Ground, employed in taking down two nets; after this was done they picked up some dead hares, which were lying on the ground near the nets, and hanging them on long sticks over their shoulders, walked homewards with them. It also appeared that they had dogs with them in the Great Ground.

Held, that the questions for the jury were—First, whether they were in the Great Ground with the intent to take game at that time, and that such intent might be inferred from the presence of the nets and dogs, though they might have taken the hares elsewhere.

Held also, that the allegation that they were "armed" could not be sustained, unless the jury should be of opinion that they took the sticks for the double purpose of carrying away the game, and of attack or defence in the event of their being interrupted by keepers while in pursuit of game.

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THE prisoners were indicted under the 9 Geo. 4, c. 69, s. 9, and the indictment charged, that they were in a certain enclosed land, called "the Great Ground," armed with bludgeons, by night, with intent then and there to take game.

Dasent, for the prosecution, proved that the four prisoners were first seen by the keepers, and all in the Great Ground, at four o'clock a.m., on the 11th February, when they were all employed in taking up two nets, which were spread across a gate and a gap in the fence. They had dogs with them, and when they had placed the nets in a bag they took up five hares which were lying dead on the ground about seven yards from the nets, and putting them over their shoulders, on sticks, walked off with them towards the village in which they all lived. The keepers, having overtaken them, caused them all to be apprehended. The sticks, when produced in court, appeared to be about four and a half feet long, and about one and half inches in diameter, one of them being weighted with an iron ferule, while another had a large knot at the thick end.

(a) Reported by J. B. DASENT, Esq., Barister-at-Law.

Power, for the prisoners, submitted that there was no sufficient proof of the material averment in the indictment that the prisoners were "then and there" in the pursuit of game, under the circumstances disclosed by the keepers. The indictment charged that the prisoners were in the Great Ground on a certain night, to the number of four or more, with intent *then and there* to take game; and it was necessary to show that allegation by distinct proof that they were in pursuit of game at that moment, and in that particular close. It was true that they had nets spread there, and that they were seen to take up and carry away five hares, which were lying dead near the nets, and that they had dogs with them, but all that was consistent with the fact that they had taken those hares elsewhere, and were returning home across the Great Ground, where they had, early in the night, placed the nets without success. They would not then be then and there in pursuit of game, and that being so, they were entitled to be acquitted. This was so laid down in Greaves's edition of Russell on Crimes, vol. 1, 478, on the authority of *R. v. Barham*, R. & M. C. C. R. 151; *R. v. Capewell*, 5 C. & P. 459; and *R. v. Griner*, 7 C. & P. 231. In the last case the prisoners were indicted for entering Breadstone Plantation, and Coleridge, J., said, in summing up, "you must say whether these persons were in this particular covert with an intent to kill game *there*. If you can suppose that they had gone out poaching in every other covert in the county, that will not be sufficient to support the charge contained in this indictment, if they were not in this particular covert with intent to destroy game there. It lies on the prosecutor to make out, to your satisfaction, that the prisoners had an intent to kill game in this particular covert." So here the prosecutor must show an intent to take game in the Great Ground, by conclusive evidence.

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ROLFE, B.—The cases have certainly gone to that length under this statute, and as the indictment charges an intent, then and there, to take game, I shall in deference to those cases, direct the jury that they must be satisfied the prisoners were in the Great Ground with intent then—that is, at that hour; and there—that is, in that spot, to take game. For my own part, however, I must say, I should have been inclined to hold that the offence was complete if a man were to be in one close and were to take game in the next; adopting, however, the view of the law suggested on behalf of the prisoners, there would be two questions:—1st, whether they were in the Great Ground with the intent, then and there, of taking game; and 2ndly, whether they were armed within the act, on which, perhaps, more doubt would arise than on the first point; as to which the jury would judge by the acts of the prisoners in the close, and their implements. It was no matter here where the hares were taken. Though they were taken in another close, the nets of the prisoners were spread in the Great Ground, and the offence was complete, though no game was taken there, if they were there with the intent to do so. The

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next question was, whether they were armed. Now the sticks which were taken from the prisoners could hardly be called bludgeons, though they certainly might be termed offensive weapons; it was clear that the men did not use them to defend themselves, or to attack the keepers, for they did not attempt any violence. In fact, the only use to which they put the sticks, was to hang the hares on, and so carry them home over their shoulders. If the jury should think that the prisoners brought out their sticks with them, or took them into the Great Ground, merely and exclusively for that purpose, then they were not *armed* within the act, though it was possible that the same sticks might have been very effectively used as offensive weapons in any affray with the keepers. If, however, the jury should think that the prisoners took the sticks out, or brought them into the Great Ground for the double purpose of staking their nets or carrying away the game, and also of attacking the keepers, if occasion should arise for such purpose, then they would be armed within the act, and might be found guilty.

The jury found all the prisoners guilty.

Ireland.

COURT OF QUEEN'S BENCH.

Hilary Term, 1849.

January 23, 24.

PATRICK GOGARTY, in Error, v. THE QUEEN. (a)

Indictment for illegal training and drilling—(Statute 60 Geo. 3, c. 1.)

The prisoner was indicted under the statute 60 Geo. 3, c. 1. in several counts; first, for that he unlawfully was present and did attend a certain meeting and assembly dangerous to the peace and security of Her Majesty's liege subjects, and then and there prohibited by law, for the purpose of training and drilling to the practice of military exercises, movements and evolutions, divers persons, to wit, &c., and then and there did train and drill to the practice of military exercises, movements, and evolutions the said persons, without any lawful authority from Her Majesty, or the Lieutenant, or two justices of the peace of the said county of the city of Dublin, or of any county or riding, or of any stewardry, or by commission or otherwise, for so doing.

And, secondly, that "he did then and there assist in training and drilling to the practice of military exercise," &c.

And, thirdly, that "he unlawfully did train and drill to the practice of military exercises, &c. &c., the said persons being then and there

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

assembled, without any lawful authority from Her Majesty, or the Lieutenant, or two justices of the peace of the county of the city of Dublin, or of any county or riding, or of any stewardry, by commission or otherwise, for so doing."

Held, that all the counts of the indictment were erroneous: first, by reason of there being no averments in any of them that the meeting and assembly therein mentioned was a meeting of persons for the purpose of training and drilling themselves, or of being trained and drilled to the use of arms, or for the purpose of practising military exercises, movements, or evolutions; and, secondly, there being no averment that the meeting in the indictment mentioned was a meeting held without any lawful authority from Her Majesty, or the Lieutenant, or two justices of the peace, &c. by commission or otherwise.

THE plaintiff in error, Patrick Gogarty, was tried, convicted, and sentenced to seven years' transportation, at the June sittings, 1848, of the Court of Oyer and Terminer and General Gaol Delivery for the County of the City of Dublin, before Blackburne, C. J., and Doherty, C. J., upon an indictment under the 60 Geo. 3, c. 1, for illegally training and drilling to the use of arms, &c.

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The indictment contained three counts.

The first count charged that, the defendant on the 16th day of April, in the 11th year of the reign, &c., with force and arms, at Great Ship-street, in the county of the city of Dublin, "unlawfully was present, and did then and there attend a certain meeting and assembly, dangerous to the peace and security of Her Majesty's liege subjects, and then and there prohibited by law, for the purpose of training and drilling to the practice of military exercise, movements and evolutions, divers persons, to wit (naming them), and then and there did train and drill to the practice of military exercise, movements and evolutions the said (again naming the parties), without any lawful authority from Her Majesty, or the Lieutenant, or two justices of the peace of the said county of the city of Dublin, or of any county or riding, or of any stewardry, by commission or otherwise, for so doing, against the peace of our said lady the Queen, her crown and dignity, and contrary to the form of the statute in such case made and provided."

The second count was the same as the first, but charging the defendant that he "did then and there assist in training and drilling to the practice of military exercise," &c. the parties named.

The third count charged the defendant that he "unlawfully did train and drill to the practice of military exercise, movements, and evolutions, the said (naming the parties) being then and there unlawfully assembled without any lawful authority from Her Majesty, or the Lieutenant, or two justices of the peace of the county of the city of Dublin, or of any county or riding, or of any stewardry, by commission or otherwise, for so doing, against the peace, &c., and contrary to the form of the statute in such case made and provided."

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The following errors were assigned:—

First, that there was no averment in said indictment, nor in any of the counts thereof; that the meeting and assembly mentioned, was a meeting and assembly “of persons for the purpose of training and drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercise, movements or evolutions.”

Secondly. That there was no averment in any count of the indictment, that the meeting therein mentioned was a meeting or assembly without any lawful authority from Her Majesty, the Lieutenant, or two justices of the peace for the county of the city of Dublin, or of any county or riding, or of any stewardry, by commission or otherwise.

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plaintiff in
error.

Stritch, for the plaintiff in error.—The only clause of the act, 60 Geo. 3, c. 1, to which it is necessary for the purposes of the present argument to call the attention of the court, is the first. That clause enacts, “That all meetings, and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms; or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from his Majesty, or the Lieutenant, or two justices of the peace, of any county or riding, or of any stewardry, by commission or otherwise for so doing, shall be, and the same are hereby prohibited, as dangerous to the peace and security of his Majesty’s liege subjects and of his government; and every person who shall be present at, or attend any *such* meeting or assembly, for the purpose of training and drilling any other person, or persons, to the use of arms, or the practice of military exercise, movements or evolutions; or who shall train or drill any other person or persons, to the use of arms, or the practice of military exercise, movements or evolutions, or who shall aid or assist therein, being legally convicted thereof, shall be liable to be transported for any term not exceeding seven years, or to be punished by imprisonment not exceeding two years, at the discretion of the court in which such conviction shall be had; and every person who shall attend or be present at any *such* meeting or assembly as aforesaid, for the purpose of being, or who shall at any *such* meeting or assembly, be trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions, being legally convicted thereof, shall be liable to be punished by fine and imprisonment, not exceeding two years, at the discretion of the court in which such conviction shall be had.” All the rules which affect indictments at common law, relate also, and apply to, indictments on statute; whatever certainty—whatever precision—is necessary in the one, is also required in the other; all indictments must be certain as to the fact, circumstances and intent, constituting the offence. The offence must appear clearly on the face of the indictment; all the facts and circumstances constituting it must be distinctly and specifically set forth. The omission of any fact or circumstance, being a material

ingredient in the offence, vitiates the pleading. As to indictments for offences created by statute, the rule is thus laid down in Archbold's Criminal Pleading, page 50, edition 1846: "An indictment for an offence against the statute must with certainty and precision charge the defendant to have committed, or omitted, the acts, and the circumstances, and with the intent, mentioned in the statute; and if any of these ingredients in the offence be omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error. The defect will not be aided by verdict (*Lee v. Clarke*, 2 East, 333); nor will the conclusion, *contra formam statuti*, cure it" (2 Hale, 170.) This rule, thus laid down by Mr. Archbold, has been uniformly enforced, and with the utmost strictness; so that it has been held that not even the fullest description of an offence, even in the terms of a legal definition, was sufficient without keeping close to the expressions of the statute: Foster, 424. The rule is thus stated in 3 Bacon's Abr. 113, tit. Indictment: "It is a general rule, that unless the statute be recited, neither the words *contra formam statuti*, nor any periphrasis, intendment, or conclusion, will make good an indictment which does not bring the offence within all the material words of the statute." So also in 2 Hawkins P. C. 249, sect. 77: "*No periphrases* (5 Co. 121) or *circumlocution whatsoever* will supply the want of those words of art which the law hath appropriated for the description of the offence; from whence it follows, that an appeal of death cannot (*Dyer*, 261; Cro. Jac. 20; 1 Edw. 4, 26) amount to a charge of murder, without the word *murdravit*, let it be never so exact and particular in setting forth the malice and all other circumstances of the killing; neither (E. C. 82, 24, 96; 9 Edw. 4, 26; 20 H. 7, 7; 1 Inst. 124) can an appeal of rape be sufficient without the word *rapuit*, &c.; nor any of the appeals above mentioned without the word *felonice*." "So necessary," says Mr. Chitty, in his Treatise on the Criminal Law, vol. 1, 283, "has it been deemed to pursue precisely the language of the statute, that in an indictment for the actual murder of the king, the compassing and imagining is laid as the treason in the terms of the statute, and the king's death itself laid only as an overt act of treason." "It was resolved that the indictment should be for compassing the death of the late king (the very compassing and imagining the king's death being the treason within the statute; 25 Edw. 3.)"—(*Kelyng*, 8.) It is so admitted that an indictment upon a penal statute must pursue precisely, and with certainty, the expressions—the words,—which the Legislature has appropriated to define the offence, that it is always to waste the time of the court to cite authority after authority in support of the proposition. It has long been a settled point, and is now a first principle, fully recognized by statute. The 32nd sect. of 9 Geo. 4, c. 54 (an Act for improving the Administration of Justice in Criminal Cases in Ireland), after providing that certain formal defects shall not stay or reverse judgment after verdict, concludes thus,—“And when

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the offence charged shall be an offence theretofore *created by statute*, or subjected to a greater degree of punishment, or excluded from the benefit of clergy, by any statute, the indictment or information shall, after verdict, be held sufficient *if it describe the offence in the words of the statute creating the offence*, or prescribing the punishment, or excluding from the benefit of clergy." It is only necessary to cite a very few cases to the court, illustrating the rule, and showing with what strictness and uniformity its observance has been enforced, in order to demonstrate that the indictment here is framed in direct violation of the rule, and in order to satisfy the court that not only does it not pursue the expressions,—the words defining the offence created by the statute,—but that, by not pursuing the statute, it omits an ingredient material to the constitution of the offence. Here, then, is a variance, not merely consisting in the introduction, or alteration, or omission of words purely superfluous and unnecessary,—but a whole passage, consisting of material words descriptive of the offence, is omitted. In *The King v. Cox* (2 Bulstrode, 258), the indictment was for a forcible entry; George Croke took exception to quash the indictment, for that the conclusion thereof, (*manu forte*) *et contra coronam et pacem regis*, was omitted also, because the same was taken before one justice of the peace only; also, it did not appear upon what statute this indictment was taken, there being two statutes. The whole court was clearly of opinion that the indictment was not good, and so by the rule of the court the same was quashed afterwards. In the case of *The Queen v. Moore* (2 Lord Raymond, 791), the defendant was convicted upon the statute: (3 Will. & M. c. 10, s. 2.) The conviction was removed into the Queen's Bench by *certiorari* and quashed, "because it says only that he (the defendant) killed deer in *quodam loco, in which they had usually been kept*, without saying *inclosed*." Here the omission of the word "*inclosed*," used in the statute, was held sufficient to vitiate the conviction, although it was stated that the defendant had "*killed the deer in a certain place in which they had usually been kept*." In 3 Dyer, 363 a, A. was indicted upon the statutes 1 & 13 Eliz. 1 & 2 of *præmunire*, for aiding one B., knowing him to be a principal maintainer of the authority and jurisdiction of the Bishop of Rome, &c., with these words in the indictment, "*against the form of the statutes aforesaid*." The indictment was held to be insufficient because the words of the statute "*upon purpose, and to the extent to set forth and extol*," &c. were omitted. The words "*against the form of the statutes*" not curing the defect. In a case reported in Noy, 171, A. was indicted upon the statute 5 & 6 Edw. 6, c. 14, that in the churchyard, such a day, *extraxit gladium* against J. L. *et ipsum percussit*, and because the statute was, "if any person *malitiosé* strike another, or shall draw any weapon with intent to strike any person, and the indictment was *quod extraxit*, but does not say *ad percutiendum*, and because it is *quod percussit* without saying *malitiosé*, the party was

discharged upon motion in arrest of judgment." There could not be a much stronger instance of the strictness with which the general rule has been enforced than that which this case affords; although the indictment stated that the defendant *extraxit gladium* against J. L. *et ipsum percussit*, from which the court might well infer that he had acted *maliciously*. Yet, the omission of that word, and because it was averred that the defendant *had actually done that* which the statute made it an offence to *intend to do*, the indictment was pronounced bad, and judgment was arrested. So, in an indictment upon the repealed statute (5 Eliz. c. 11, s. 2), which makes it high treason to clip round or file any of the coin of the realm "*for wicked lucre or gain's sake*," it was necessary to charge the offence to have been committed for "*wicked lucre and gain's sake*:" (1 Hale, 220.) And in an indictment on the statute (9 Geo. 4, c. 31, s. 12) charging the prisoner with "*feloniously, wilfully, and maliciously cutting*," is not sufficient, the words of the statute being "*unlawfully and maliciously*:" (*The Queen v. Ryan*, 2 Moo. C. C. 15.) An indictment upon the repealed statute (2 Geo. 2, c. 25) which made the stealing of "*bank notes*" felony, charging the defendant with stealing "*a certain note, commonly called a bank note*," was holden bad, because it did not follow the description of the property in the statute: (*King v. Craven*, R. & R. 14.) In that case, although the words of the statute, "*bank note*" were used by the pleader, yet the mere addition of the words "*a certain note, commonly called*," rendered the indictment bad. In *The King v. Davis* (1 Leach, 493), the prisoner was indicted upon the Black Act, (9 Geo. 1, c. 22); it was held that the term "*wilfully*" was necessary, being one of the terms used by the Legislature, and "*unlawfully and maliciously*" would not suffice. In that case some of the judges thought that "*maliciously*" included "*wilfully*," but the majority held that as "*wilfully*" as well as "*maliciously*" was mentioned in the statute as descriptive of the offence, both should be stated in the indictment. In the case of *The King v. Compton* (7 Car. & P. 139), the indictment in one count charged the defendant that he did break *to get* out, and in another that he did break *and get* out: the indictment was holden ill, the words of the act being "*break out*." The mere interpolation in the first count of the words "*to get*," and in the second count of the words "*and get*," destroying the pleading. The indictment here, in the first count charges that Patrick Gogarty "*unlawfully* was present at, and did then and there attend, a certain meeting, dangerous to the peace and security of Her Majesty's liege subjects and of her government, for the purpose of training and drilling to the practice of military exercise, movements and evolutions, divers to wit (naming the parties), and then and there did train and drill to the practice of military exercise, movements and evolutions, the said (again naming the parties), without any lawful authority from Her Majesty, or the Lieutenant, or two justices of the peace of any county or riding, or of any stewardry, by commission or otherwise for so doing, against the peace, &c., and contrary to the form of the

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statute," &c. The 2nd count is the same as the first, but charging "that the defendant did then and there assist in training and drilling to the practice of military exercise, &c., the said parties," (naming them.)

The 3rd count charges the defendant, that he "*unlawfully did train and drill to the practice of military exercise, movements and evolutions, the said (naming the parties) being then and there unlawfully assembled without any lawful permission from her Majesty, &c., against the peace, &c., and contrary to the form of the statute,*" &c. The pleader has not in any count in the indictment described the offence, that is, the meeting, in the words of the statute, as "a meeting and assembly of persons, for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercises, movements, or evolutions." In the first two counts of the indictment, he has adopted the words of the act, which prohibit such meetings and assemblies, but he totally omits the words of the act which are used to describe the kind of meetings and assemblies which it prohibits. The words "a certain meeting, dangerous to the peace and security of Her Majesty's liege subjects, and of her government," give it, it is true, the description of an unlawful, of an illegal meeting, in the terms of a legal definition, but that is not sufficient in an indictment upon a penal statute, without keeping close to the expressions, to the words of the act. The mere averment that *the meeting*, at which the defendant attended, was "an unlawful meeting, then and there prohibited by law," is insufficient, because it manifestly does not bring that particular meeting within the material words of the act. It does not show in what respect it was an "unlawful meeting" within the meaning of the act. Descriptive words used by the Legislature are omitted, and in consequence of that omission, a material ingredient in the constitution of the offence is not averred, viz., *the purpose of the meeting*. The words used in the indictment create an uncertainty, which is not cured by the conclusion, *contra formam statuti*.

They are mere general words, equally applicable to all meetings, prohibited by this or by any other statute. They would apply as well to meetings and assemblies declared "*unlawful*" by the Riot and Whiteboy Acts; or to meetings and assemblies at St. Patrick's purgatory, or other holy wells, prohibited by the statute Anne, to prevent the further growth of Popery. A meeting or assembly contrary to the provisions of the Convention Act, as it is commonly called (the 33 Geo. 3, c. 29), would be "*an unlawful meeting prohibited by law.*" Yet in an indictment upon that statute, a mere averment that the meeting was "an unlawful meeting, prohibited by law," and a conclusion *contra formam statuti*, would be insufficient. In an indictment upon that statute, it would be necessary to set forth in the words of the Legislature, that the assembly or meeting, was an assembly, or committee, or body of *persons elected, or in some manner constituted, or appointed to represent, or assuming, or exercising a right or authority to represent the*

of this realm, &c. It would be necessary to pursue the of the statute, without the slightest ambiguity or uncertainty as to bring the meeting clearly within some one of the tions given in the act. This was done in the case of *The gainst Sheridan and Kirwan*, 31 State Trials (Cobbett's), ff, in the case of *The Queen v. Ryan* (2 Moody), and in the

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The King v. Davis, 1 Leach, 493, the omission of one word in the statutes, as descriptive of the offences charged, even the larger, the more comprehensive term of the act was d; if the omission of one word was held sufficient to vitiate ictment, *à fortiori*, should the present indictment be holden here several words, an entire passage used in the act as tive of the offence, is totally omitted, and words too, actually contain an essential circumstance and ingredient constitution of the offence, namely the *purpose*, the *intent* meeting. The third count varies somewhat from the two ut is even still more open to this objection. It describes eting in language differing still more widely from the de- re language of the statute. It simply states that the named "*were then and there unlawfully assembled, without vful authority from Her Majesty,*" &c. If it was necessary e in the indictment that the parties named were assem- t all, it was also necessary to state that they were assem- the purpose prohibited *by the act*, otherwise the meeting not be an unlawful meeting *within the act*, and the defen- attendance at such a meeting could not be an offence the act.

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error

ay be contended that "*to train or drill any other person or to the use of arms, or the practice of military exercise, move- or evolutions,*" is a distinct, a substantive offence against the id that the defendant below was duly convicted of that . But the act cannot be so construed. If this were a construction of the act, it would be an offence against its ons for any man to train or drill, whether he had the autho- entioned in the act or not. For if the pleader, grounding rge upon the words of the act just mentioned, could, with- iating the indictment, omit all mention of the meetings and lies referred to in the act, he might also omit to negative eption in the act in favour of those who have authority to le to be drilled from Her Majesty, or the Lieutenant, or two s of the peace, or by *commission*, or otherwise: upon such a iction every adjutant, serjeant, and corporal in the British might be prosecuted for the misdemeanor created by the . Besides, the words of reference, "*any such meeting,*" everal times in the enacting clause, clearly demonstrating e act was intended to apply solely to such meetings as are ed in the commencement of the enacting clause. The intent Legislature is not to be collected from any particular sion, but from a general view of the *whole* of an act of Par- t: (per Best, C. J., 4 Bing. 196.) In 7 Barn. Cress. 660,

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the rule is thus laid down by Lord Tenterden, C. J. :—"In construing acts of Parliament, we are to look at the language of the whole act; and if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in the other parts of the act, and upon a view of the whole act, we can collect, from the more large and extensive expressions used in other parts, the real intention of the Legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause." Here the real intention of the Legislature is manifested—to prevent assemblies of persons, not legally authorized, from training and drilling. This is the larger meaning of the act, to which the court is bound to give effect.

If this indictment, omitting, as it manifestly does, the greater portion of the description given in the statute of the offence created by the statute, be a good and sufficient indictment—if the framers of an indictment upon a statute can select such portions of the language of the statute as they may think fit—if they can with safety omit one portion of the language describing the offence, then there is no reason why they may not omit it entirely; and, contenting themselves with a mere general averment that a prisoner has acted "contrary to the form of the statutes in such case made and provided," leave it to the jury to decide, not only as to the facts and circumstances of the case, their acknowledged province, but as to the law, which is peculiarly the province of the bench; the jury would have to adjudicate, not only on the circumstances of the case, but to supply the omissions of the pleader, and to find that the offence charged was an offence against the law, *within the meaning of the law*. [The second assignment of error is, that there was no averment in the indictment that the meeting therein mentioned was a meeting or assembly, *without any lawful authority from Her Majesty, or the Lieutenant, or two justices of the peace for the county of the city of Dublin, or of any county or riding, or of any stewardry, by commission or otherwise*. This objection to the indictment in the present case, is grounded upon the settled principle applicable to all cases of offences created, and of penalties imposed by statute. The general rule in all such cases is, that all exceptions in the enacting clause must be negatived in the indictment. It is thus laid down by Mr. Chitty :—"If the exceptions themselves are stated in the enacting clause, it will be necessary to negative them in order that the description of the crime may in all respects correspond with the statute." (1 Chitty, C. L. 283.) In 3 Bacon's Abr. 114, tit. Indictment, it is laid down, that "a conviction on a penal statute ought expressly to show that the defendant is not within any of its provisoes; for, since the defendant has no remedy against such a conviction, but from a defect appearing upon the face of it, it ought to have the highest certainty, and to satisfy the court that the defendant had no such matter in his favour, as the statute itself allows him to plead." This point is so settled by the constant tenor of all the authorities, that it is only necessary to refer

the court generally to the cases collected: 1 Saunders, 262; *R. v. Jervis*, 1 Burrow, 148; *R. v. Pratten*, 6 T. R. 559; *Thibault v. Gibson*, 12 Mee. & Wels.; *King v. Marriott*, 1 Strange; *R. v. Wheatman*, 1 Douglas; *Lawton v. Hickman*, and *O'Neill v. Brindley*, 25 L. J. pp. 20, 26. In the case of *Thibault v. Gibson* (12 M. & W. 88), a *qui tam* action to recover a penalty under the 12 Anne, c. 16, it was argued that the 2 & 3 Vict. c. 37, s. 1, had virtually repealed the statute of Anne. Parke, B., in giving judgment, said, "wherever a statute inflicts a penalty for an offence created by it, but there is in the enacting clause an exception of persons under particular circumstances, it is necessary to state that the defendant is not within any of the exceptions, and it seems immaterial whether the exception be in the same section or in a preceding act of Parliament, referred to by the enacting clause." Does the indictment in the present case properly negative the exception contained in the enacting clause of the 60 Geo. 3, c. 1? The indictment here, in the first and second counts, negatives authority in the defendant to drill, or to assist in drilling, but the act applies the want of authority to the meetings and assemblies of persons for the purpose of *training or drilling themselves to the use of arms, and to the exercise of military evolutions, &c.* In order properly to negative the exceptions in the act, it would be necessary to negative authority in the persons composing the meeting as such, and not merely as here in the person drilling. *Non constat*, from the two first counts of this indictment, but that the persons named as constituting the meeting had authority to be drilled. It is not averred that *they* were not within the exception of the act. Now, authorizing *them* to be drilled, would make no offence in *the defendant* to drill them. And the court is bound to presume from the form of the pleading that *they* had such authority; for the rule is, that we are bound to presume the negative of everything the pleader has not expressly affirmed, and the affirmative of everything he has not precisely negated. The act expressly refers the want of authority to the meetings and assemblies. In this instance the existence of that authority in the meeting mentioned in the indictment is not negated, and the court is therefore bound to presume that it existed, and if so, it was no offence in the defendant to drill such a meeting. In the third count, the pleader had evidently intended to negative authority in the parties assembled—but has he done so with the necessary clearness and precision? He states that the persons named "were then and there unlawfully assembled, without any lawful authority from Her Majesty," &c. But he omits to aver that they were "unlawfully assembled" within the meaning of the act, namely, that they were unlawfully "assembled for the purpose of training and drilling themselves, or of being trained and drilled to the use of arms, or for the purpose of practising military exercise, movements or evolutions."

Smyly (with whom was *Baldwin*, Q.C., for the crown), contended that the meaning of the statute was, that the purpose which it

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recited, and which was necessary to be averred, was the purpose, not of the meeting, but of the parties who were present, and that therefore the purpose required to be alleged was the purpose of the individuals who attended the meeting. The indictment states that Gogarty was present at the meeting; he became incorporated with, and was a portion of it, at the time the purpose for which the meeting was assembled was introduced. [PERRIN, J.—Do you ascribe the purposes mentioned in the indictment to the prisoner?] Yes. [PERRIN, J.—Then, you leave the meeting without a purpose?] The purpose of the individuals who attend the meeting creates the offence, and not the purpose for which the meeting is held.

Fitzgibbon, Q.C., on behalf of the plaintiff in error, relied on the absence of a proper averment descriptive of the nature of the meeting, or showing the absence of lawful authority for it, and cited upon the construction of the statute in this respect, *Bell's case*.

Baldwin, Q.C., replied.

January 24.—JUDGMENT.

Judgment of
Blackburn, C.J.

BLACKBURNE, C. J.—The indictment in this case of *Gogarty* against *The Queen* is founded upon the act of the 60 Geo. 3, c. 1. The plaintiff has assigned in the different counts two errors; the first is, that none of the counts contain a sufficient averment that the meetings or assemblies which they severally state, are such as the act prohibits. The first and second counts are the same in terms, except that the offence in the former is that of training and drilling to the practice of military exercises, while the second is for aiding and assisting in such training and drilling; and the third count of the indictment is, for having drilled certain and other persons unlawfully assembled. The statute commences with an enactment that all meetings and assemblies for the purpose of training and drilling themselves, or of being trained or drilled, to the use of arms, and for the purpose of practising military exercises, movements and evolutions, without lawful authority, should be prohibited. If the act closed here, an indictment for violating its provisions must have distinctly averred that the meeting was for one of the purposes stated in the act, namely, of training or drilling themselves to the use of arms, or of being trained or drilled to the use of arms, or for the purpose of practising military exercises, movements and evolutions. It must also have negatived the existence of any such authority conferred on the meeting as the act states, so that the course is plain according to the established rules of pleading. The statute next proceeds, not to enact any new offence, but merely to prescribe the punishment of those who shall violate it; so that the first allegation to be made is, that the purpose of the meeting brought it within the prohibition and made it illegal. It is of the very essence of the crime that the meeting should be illegal within the

meaning of the act, otherwise none of the enumerated acts could come within its penal consequences. It is quite plain that it is a violation of the terms of the act to attend such a meeting for the purpose of training and drilling. The next words which follow "who shall train or drill any other person to the use of arms," manifestly mean any person who should attend such illegal meetings as had been already described. If then it was necessary, as I think it was, to aver that the meetings and assemblies were for the purposes specified in the prohibitory part of the statute, it is plain that all the counts are bad, for in none of them is this done. None of them aver that the assembly was for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercises, movements, or evolutions. I also think that all the counts are open to the third objection: for, upon a consideration of them, it is manifest that it has not negatived the authority of the plaintiff in error, to train, or drill, or act, as he is alleged by the indictment to have done.

CRAMPTON, J.—I entirely concur in the judgment pronounced by the Lord Chief Justice.

PERRIN and MOORE, JJ., also expressed their concurrence.

BLACKBURNE, C. J.—The judgment, therefore, must be reversed.

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*The prisoner, who had been brought up
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Ireland.

COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 1848.

November 9, 13, 14, and 18.

JOHN MARTIN, in error, v. THE QUEEN.(a)

Writ of error—Caption, form of—Crown and Government Security Act—Indictment under form of—Challenge to juror on ground of interest—Form of sentence of transportation.

The caption of an indictment stated that at an adjournment of a commission of Oyer and Terminer and General Gaol Delivery, holden in and for the county of the city of Dublin, at the Sessions House, Green-street, in the said county of the city of Dublin, on Tuesday, the 8th day of August, 1848, and in the 12th year of our Sovereign Lady the Queen, before the Right Honourable Jeremiah Dunne, Lord Mayor of the city of Dublin; the Right Honourable David Richard Pigot, Chief Baron of Her Majesty's Court of Exchequer; and the Honourable Richard Pennefather, one of the Barons of Her Majesty's Court of Exchequer; and others their fellows, Justices and Commissioners of our said lady the Queen, in and for the whole county of the said city of Dublin, assigned by letters patent, &c., directed to S. W., &c. &c., to inquire, examine, discuss, and determine, by the oath of good and lawful men of the county of the city of Dublin aforesaid, and by other ways and means, &c., of all treasons, suspicions of treasons, &c. &c., by any person or persons within the county aforesaid, done, committed, perpetrated, or hereafter to be done, &c., and to deliver the gaol of Newgate, and all other the gaols in the county of the city, of all malefactors and prisoners from time to time, and to hear and determine all and singular the premises—it was presented upon the oath of good and lawful men of the body of the said county of the city of Dublin, whose names here follow—(setting out the name of twenty-three grand jurors)—in manner and form following:

Held, that this caption was not erroneous, and that it appeared from it with sufficient certainty when, where, and before whom the oath was administered to the grand jury, and when and where the presentment was made: and that the names of the grand jurors having been set forth in the caption it sufficiently appeared thereby that the bill was found by twelve grand jurors, though the number was not stated.

Held, also, that the caption was not vitiated by the omission of the words sworn and charged.

The indictment charged in one set of counts, that the prisoner did feloniously compass, imagine, invent, devise, and intend to deprive and depose our Sovereign lady the Queen, from the style, honour, and royal name of the imperial crown of the United Kingdom; and the said felonious compassing, imagination, invention, device, and inten-

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

tion did express, utter, and declare by then and there feloniously publishing certain printings in a certain public newspaper called the "Irish Felon;" and in another set of counts the prisoner was charged in similar terms with compassing to levy war against Her Majesty.

Held, upon writ of error, that the indictment well charged an offence under the statute 11 Vict. c. 12; and that it was not necessary either to aver that the printings therein charged were felonious printings, or further to aver that they were expressive and declaratory of the previously charged compassings and imagination, or that they were published "of and concerning" Her Majesty the Queen, and the Crown and Government of the United Kingdom, or of and concerning some traitorous or felonious design then on foot, or intended to be taken.

A challenge was tendered to one of the jurors, on the ground that he was interested in the conviction of the prisoner, inasmuch as by a charter of Henry the Fifth, it was granted to the then corporation of Dublin, their heirs and successors (which charter, and the rights and franchises thereby granted, was averred to have become by the Municipal Corporations Act, (3 & 4 Vict. c. 105,) duly vested in the present Corporation of the city of Dublin) that they "should have all and all manner of goods and chattels of felons and fugitives to be condemned or convicted within the said city of Dublin and the liberties thereof thereafter arising;" and that such goods and chattels were applicable to the purposes of the borough fund of the city of Dublin; and that the prisoner had within the city goods to the value of twenty shillings: and that William Duff was a burgess of said city, and occupier of certain hereditaments within the city liable to be rated to a borough rate; and that the borough fund was deficient after the payment of all the claims upon the corporation; and that, therefore, the juror was interested in the conviction of him the said John Martin.

This challenge was upon demurrer overruled.

Held, upon writ of error that it was rightly disallowed, and that the juror was not liable to objection, he not having, as a burgess, any direct personal interest in or control over the application or disposal of such goods and chattels, the disposal of which was vested, if at all, in the town council: nor yet as a rate-payer, for that it did not appear by the challenge that the preliminaries which were by the 133rd section of the statute essential to enable the council to impose a borough-rate, had been complied with, and at all events that his liability to be rated (if any) was a contingent liability to a future rate; and, therefore, did not affect his competence.

Query, whether in such challenge the absence of an averment that the franchise has been lost or forfeited by non user, is not a fatal omission?

The judgment entered upon the record was, that the said J. M. "be transported beyond the seas for the term of ten years, from the 8th day of August instant," without specifying some place of transportation, "not in Europe."

Held, that the judgment was correct and valid, notwithstanding.

IN this case the prisoner, at a session of the Court of Oyer and Terminer and General Gaol Delivery for the county of the city of Dublin, held before the Lord Chief Baron (Pigot) and Mr. Baron Pennefather, was convicted upon all the counts of an

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JOHN MARTIN, indictment charging him with divers offences against the statute
IN ERROR, 11 Vict. c. 12, and upon each count a judgment of transportation
v. THE QUEEN. for ten years was passed.

—
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Upon this judgment the prisoner sued out a writ of error.

The record returned to the court here was (as far as it is material to be stated) as follows:—

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County of the city of Dublin, to wit:—Be it remembered that an adjournment of a Commission of Oyer and Terminer and General Gaol Delivery, holden in and for the county of the city of Dublin, at the Sessions House, in Green-street, in the said county of the city of Dublin, on Tuesday, the 8th day of August, 1848, and in the twelfth year of the reign of our Sovereign lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, and Defender of the Faith, and so forth, before the Right Honourable Jeremiah Dunne, Lord Mayor of the city of Dublin; the Right Honourable David Richard Pigot, Chief Baron of Her Majesty's Court of Exchequer; and the Honourable Richard Pennefather, one of the Barons of Her Majesty's Court of Exchequer; and others their fellow-justices and commissioners of our said lady the Queen, in and for the whole county of the said city of Dublin, assigned by letters patent of our said lady the Queen, under the great seal of that part of the United Kingdom of Great Britain and Ireland, called Ireland, bearing date at Dublin, the 1st day of December, in the first year of the reign of our said lady the Queen, directed to Samuel Warren, the then Lord Mayor of the said city for the time being; Charles Kendal Bushe, the then Chief Justice of the Court of Chief Place in Ireland, and the Chief Justice of the said Court of Chief Place, for the time being; John Doherty, Chief Justice of the Court of Common Pleas, in Ireland, and the Chief Justice of the said Court of Common Pleas, for the time being; Henry Joy, the then Chief Baron of the Court of Exchequer in Ireland, and the Chief Baron of the said Court of Exchequer for the time being; Charles Burton, then one of the Justices of the Court of Chief Place; Arthur Moore, then one of the said Court of Common Pleas; Richard Pennefather, one of the Barons of the Court of Exchequer in Ireland; Philip Cecil Crampton, one of the Justices of the Court of Chief Place; William Johnson, then one of the Justices of the Court of Common Pleas in Ireland; John Leslie Foster, then one of the Barons of the Court of Exchequer in Ireland; Louis Perrin, one of the Justices of the Court of Chief Place in Ireland; Robert Torrens, one of the Justices of the Court of Common Pleas; and John Richards, one of the Barons of the said Court of Exchequer; and all Justices and Barons of the said Courts of Chief Place, Common Pleas, and Exchequer, in Ireland aforesaid, respectively for the time being, and others in the said letters named, to inquire, examine, discuss, and determine by the oath of good and lawful men of the county of the city of Dublin aforesaid; and by other ways, means, and methods whereby the truth might be better known of all treasons, suspicions of

treasons, insurrections, rebellions, counterfeits, clippings, washings, unlawful coinage, and other falsifyings of money, and of all murders, felonies manslaughters, killings, robberies, burglaries, perjuries, forgeries, rapes, unlawful assemblies, extortions, riots, routs, crimes, contempt, deceit, injuries, escapes, and other offences and causes whatsoever, as well against the peace and the common law of that part of the said United Kingdom called Ireland, as against the form and effect of any statute, act, or ordinance theretofore made, ordained, or confirmed, or of any statute, act, ordinance, or provision thereafter to be made, ordained, or confirmed, by any person or persons within the county of the city of Dublin aforesaid, in any wise done, committed, or perpetrated, or hereafter to be done, committed, or perpetrated; and also of all accessories to the said offence, and any of them within the said county of the city of Dublin, by whomsoever or howsoever had, done, perpetrated, or committed by any person or persons, at any time howsoever, and in any matter whatsoever; and to deliver the gaol of Newgate, and all other the gaols in the county of the city of Dublin aforesaid, of all malefactors and prisoners, from time to time, as often as occasion shall require; and to hear and to determine all and singular the premises. It is presented upon the oath of good and lawful men of the body of the said county of the city of Dublin, whose names here follow; that is to say:—William Latouche Worthington, John Strong Armstrong, John Brennan, Philip Dixon Hardy, Abraham Studert, William Lilly, Joseph Kincaid, James Booth, Richard Whitehead, Francis Devitt, Robert Hunt, William Russell, John Richard Andrews, George Browne, John Chambers, Robert Deaker, Edward Higginbotham, James Kerr, Francis Pillsworth, Park Neville, Alexander Findlater, Peter Roe Clarke, and George Wilson Boileau, in manner and form following, that is to say:—

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County of the city of Dublin, to wit:—The jurors for our lady the Queen, upon their oath present, that John Martin, late of Loughorne, Newry, in the county of Down, gentleman, after the passing of an act of Parliament made and passed in the 11th year of the reign of our Sovereign lady, Queen Victoria, and entitled “An Act for the better Security of the Crown and Government of the United Kingdom,” on the 24th day of June, in the 12th year of the reign of our said Sovereign lady, Queen Victoria, with force and arms at the parish of Saint Thomas, in the county of the city of Dublin, within the United Kingdom, feloniously did compass, imagine, invent, devise, and intend to deprive and depose our said Sovereign lady the Queen, from the style, honour, and royal name of the imperial crown of the United Kingdom; and the said felonious compassing, imagination, device, and intention, he the said John Martin, then and there feloniously did express, utter, and declare, by then and there feloniously publishing certain printings in a certain number of a certain public newspaper called the “Irish Felon,” one of which said printings is as follows; that is to say—[here followed a letter from John

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Martin, headed "To all whom it may concern"; and one other of which said printings is as follows—[here followed a letter from a Mr. Lalor to the editor of the "Irish Felon"]; and the said felonious compassing, imagination, invention, device, and intention, he the said John Martin afterwards and after the passing of the said act of Parliament, on the 1st day of July, in the 12th year of the reign of our said lady the Queen, at the parish aforesaid, in the county of the city of Dublin aforesaid, did further feloniously express, utter, and declare, by then and there feloniously publishing certain other printings in one other number of the said public newspaper called the "Irish Felon," one of which said last-mentioned printings is as follows; that is to say—[here followed a letter from Mr. Lalor, headed "The First Step," "The Felon Club"]; and one other of which said last-mentioned printings is as follows; that is to say—[here followed a letter from Mr. Lalor, headed, "To the Confederate and Repeal Clubs in Ireland."] And the said felonious compassing, imagination, invention, device, and intention he the said John Martin afterwards and after the passing of the said act of Parliament, on the 15th day of July, in the 12th year of the reign of our said lady the Queen, at the parish aforesaid, in the county of the city of Dublin aforesaid, did further feloniously express, utter, and declare, by then and there feloniously publishing a certain other printing in one other number of the said public newspaper called the "Irish Felon," which said last-mentioned printing is as follows; that is to say—[here followed a letter from a Mr. Brennan, headed, "The Crowning of Felony"]; and the said felonious compassing, imagination, invention, device, and intention, he the said John Martin, afterwards and after the passing of the said act of Parliament, on the 22nd day of July, in the 12th year of the reign of our said lady the Queen, at the parish aforesaid, in the county of the city of Dublin aforesaid, did further feloniously express, utter, and declare by then and there feloniously publishing certain other printings in one other number of the said public newspaper called the "Irish Felon," one of which said last-mentioned printings is as follows; that is to say—[here was set out Mr. Martin's letter, headed "Prevention of Crime and Outrage," and "To the Members of the Repeal Clubs of Ireland;"] and one other of which said last-mentioned printings is as follows; that is to say—[here followed Mr. Lalor's letter, headed "Clearing Decks"];—and one other of which said last-mentioned printings is as follows—[here followed Mr. Brennan's letter, headed "To the Young Men of Ireland,"] against the form of the statute in such case made and provided, and against the peace of our Sovereign lady the Queen, her crown and dignity.

Thirteen other counts followed, of which five were precisely similar to the first, except that each of them omitted some one or more of the publications charged in the first count. There were also a set of six counts similar in construction to the above-mentioned, and setting out the same publications, but charging a compassing to

levy war against Her Majesty. The two remaining counts charged, one of them, a compassing to deprive and depose Her Majesty, and the other, a compassing to levy war; and alleged the publication of divers printings as overt-acts of such compassing, but did not set them out. The record then stated the prisoner's plea of not guilty to this indictment; the joinder of issue by the Attorney-General upon that plea; the award of a jury to try the issue; that certain of the jurors came and were sworn, and then proceeded as follows:—

“ And William Duff, one other of the said jurors, is thereupon also called, and answers to his name; and thereupon the said John Martin challenges the said William Duff; because, he says, that the city of Dublin hath been from the time whereof the memory of man runneth not to the contrary, and now is, a body corporate; and that by a certain charter granted to the then Mayor and Commons of the said city of Dublin by our late lord, King Henry the Fifth, which said charter was afterwards confirmed by divers other charters granted by the successors of our said lord, King Henry the Fifth; our said lord, King Henry the Fifth, granted to the said Mayor and Commons of the said city of Dublin that they, their heirs, and successors should have all and all manner of goods and chattels of felons and fugitives to be condemned or convicted within the said city of Dublin, and the liberties thereof thereafter arising, as by said charters, which the said John Martin brings into court more fully appears; and the said John Martin further saith, that at the time of the passing of a certain act of Parliament passed in the session of Parliament held in the 3rd and 4th years of the reign of our Sovereign lady, the now Queen, entitled, ‘An Act for the regulation of Municipal Corporations in Ireland,’ the said charter and the rights and franchises thereby granted were duly vested in the Right Honourable the Lord Mayor, Sheriffs, Commons, and Citizens of the city of Dublin, and which said Right Honourable the Lord Mayor, Sheriffs, Commons, and Citizens were then and there the same body corporate mentioned in the said charter, which had been granted to them by the name of the Mayor and Commons of the said city of Dublin, And the said John Martin further saith that afterwards, and after the passing of the said last mentioned act, said last mentioned act became, and was, and now is, in force in the city of Dublin. And the said John Martin further saith, that after the passing of the said last mentioned act, and after same became and was in force in the said city of Dublin, such proceedings were duly had, that afterwards, pursuant to the provisions of the said last mentioned act, there were duly elected, according to the provisions of said act, to wit, on the 25th day of October, in the year of our Lord 1841, at Dublin, in the county of the city of Dublin, in and for the said borough of the city of Dublin, the number of aldermen and councillors by the said act prescribed, by virtue whereof, and said several proceedings, there hath been since, and now is, in the said city of Dublin a body corporate, called and known by the

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 IN ERROR, Burgesses of Dublin, pursuant to the provisions of the said last
 v. mentioned act. And the said John Martin further saith, that the
 THE QUEEN. goods and chattels of felons and fugitives so granted by the said
 ——— charter of our said lord King Henry the Fifth, to the Mayors and
 Crown and Commons of the said city of Dublin are now vested in the said
 Government Right Honourable the Lord Mayor and Burgesses of said city, and
 Security Act. are applicable to the purposes of the borough fund of said city.
 And the said John Martin further saith, that he, the said John
 Martin, hath within the city of Dublin divers goods and chattels of
 great value, to wit, of the value of twenty shillings, and that the
 said William Duff is a burgess of the said city of Dublin, and an
 occupier and tenant of certain hereditaments within the city of
 Dublin, liable to be rated to a borough rate in the said city of
 Dublin, and that the borough fund of the city of Dublin after the
 payment of all debts due from the body corporate, in said herein-
 before recited act mentioned, and contracted before the passing of
 said act, and after satisfaction of all lawful claims upon the real
 and personal estate of such body corporate is not sufficient for the
 purpose in said act mentioned. And the said John Martin saith,
 that for the reasons aforesaid the said William Duff is interested
 in the conviction of him the said John Martin, wherefore the said
 John Martin prays judgment, and that the said challenge may be
 allowed and so forth."

The record.

After setting out a demurrer by the *Attorney General* to this challenge, assigning as causes of demurrer, "that the said John Martin has not by the said challenge shown that the goods and chattels of felons convicted within the city of Dublin are applicable to the purposes of the borough fund in the said challenge mentioned, or can be expended in diminution of, or to prevent the necessity of a borough fund, or are applicable to the purposes for which the said borough fund, in said challenge, is applicable; and that the said John Martin has not by his said challenge shown that the said William Duff has any immediate, direct, or personal interest in the goods and chattels of felons convicted in manner as in the said challenge alleged, and that the said challenge is in other respects uncertain, informal, insufficient, and so forth." The record then stated the disallowance of the challenge by the court, that William Duff was sworn of the jury, and that the other jurors were duly sworn, and that the jury found the prisoner guilty upon each of the fourteen counts in the indictment; that it was demanded of the prisoner whether he had anything to say for himself wherefore the said justices and commissioners should not proceed to judgment, and that the prisoner "said nothing further than he had before said." The record then proceeded as follows:—"Whereupon all and singular the premises being seen, and by the said justices and commissioners here fully understood, it is considered and adjudged by the court here that he, the said John Martin, for the said felony in the said 1st count of the said indictment above specified and charged, be transported beyond the seas for the term of ten years from the 8th

day of August instant." And the like judgment of ten years' transportation, to commence from the said 8th day of August, was entered on each of the other counts.

Upon this record, the prisoner having been brought up on the 9th of November, 1848, by a habeas corpus to the bar of the court, entered the following assignment of error:—

"And now, that is to say, on Thursday, the 9th day of November, in this same term, comes the said John Martin, into the court here of our lady the Queen, before the Queen herself, in his own proper person, in the custody of the keeper of Her Majesty's prison, called Richmond General Penitentiary, on the South Circular-road, by virtue of a writ of *habeas corpus* duly issued in that behalf, and immediately says, that in the record and proceedings aforesaid, and also in the giving the judgment aforesaid, there is a manifest error in this, to wit, that by the record aforesaid it appears that judgment was given upon the record aforesaid, for our said lady the Queen, whereas by the laws of this realm judgment ought to have been given thereupon for the said John Martin, and against our said lady the Queen, and, therefore, in that there is manifest error. There is error in this, to wit, that it does not appear by the record aforesaid, that the jurors aforesaid, by whom the said indictment was found a true bill, were sworn by, before, or in the presence of the commissioners and justices of our said lady the Queen, in the said record mentioned, or any of them, or by, before, or in the presence of any court, commissioners, justices, or other person or persons empowered in that behalf to swear said jurors or administer to them an oath; and, therefore, in that there is manifest error. There is also error in this, to wit, that it does not appear by the record aforesaid, when or where the jurors aforesaid, who found said indictment a true bill, were sworn as jurors, or that they were sworn or charged to inquire for or on behalf of our said lady the Queen, and the body of the said county of the city of Dublin, in manner by law required; and, therefore, in that there is manifest error. There is also error in this, to wit, that it does not appear by the record aforesaid that the jurors aforesaid, who found the said indictment a true bill, had any jurisdiction to find the said indictment a true bill, and therefore, in that there is manifest error. There is error also in this, to wit, that it does not appear by the record aforesaid, that the said indictment was found a true bill by twelve good and lawful men of the body of the county of the city of Dublin, as in that behalf is required by law; and, therefore, in that there is manifest error. There is error also in this, to wit, that it appears by the record aforesaid, that judgment was given for our said lady the Queen, against the said John Martin, upon each and every of the counts of the said indictment, whereas judgment should have been given on each and every of the said counts for the said John Martin, and against our said lady the Queen, inasmuch as each and every of the said counts in the indictment is bad in point of law; and, therefore, in that there is manifest error. There is error also in this, to wit, that by the

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record aforesaid it appears that judgment was given for our said lady the Queen upon the demurrer put in by her Majesty's Attorney-General to the challenge of him the said John Martin, to William Duff, one of the jurors aforesaid, who passed upon him, the said John Martin, on the indictment aforesaid, whereas judgment should have been given for him, the said John Martin, upon the demurrer aforesaid; and, therefore, in that there is manifest error. There is also error in this, to wit, that by the record aforesaid, it appears that for the felony charged against him the said John Martin, in each and every of the counts of the indictment aforesaid, he, the said John Martin, was adjudged to be transported beyond the seas for the term of ten years from the 8th day of August last, whereas by law no such sentence could be pronounced; and, therefore, in that there is manifest error. There is error also in this, to wit, that the judgment aforesaid passed upon him the said John Martin, is insufficient, uncertain, and defective, informal, and not warranted by the common or statute law of this realm; and, therefore, in that there is manifest error. There is error also in this, that there is no place mentioned in the judgment aforesaid, to which the said John Martin should be transported, contrary to the form of the statute in such case made and provided; and, therefore, in that there is manifest error. And the said John Martin prays that the judgment aforesaid for the errors aforesaid and divers other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether holden for nought, and that he may be restored to all things which he has lost by reason of the judgment aforesaid, and so forth.

"JOHN MARTIN,
"COLMAN M. O'LOGHLEN."

The *Attorney-General* having joined in error on behalf of the crown, the case was set down, and now (November 13th, 1848,) was called on for argument.

Sir C. O'Loghlen
for the plaintiff
in error.

Sir *Colman O'Loghlen* for the plaintiff in error.—There are four general heads of objection to this record: first, to the caption; secondly, to the indictment itself; thirdly, the disallowance of the challenge to William Duff; fourthly, the form of the sentence. The objection to the caption is, that it does not appear by the record, that the jurors by whom the indictment was found a true bill, were sworn by, before, or in the presence of the commissioners and justices of our lady the Queen, in the said record mentioned, or any of them, or of any court, commissioners, or justices, or other person or persons empowered in that behalf, to swear said jurors, or administer to them an oath.

It should have stated that the bill was presented on the oaths of twelve good and lawful men of the county of the city of Dublin, then and there sworn and charged to inquire on behalf of our lady the Queen, and of the body of the county of the city of Dublin. If the indictment had been found in the Queen's Bench I admit that the objection might not be a good one, because the court

would take judicial cognizance that the jury were duly sworn and charged. In *Rex v. Farre* (1 Keble, 629) it is said, "In indictments here (Queen's Bench) in regard the court takes the grand jury's presentments, the entry is only *quod per sacramentum duodecim constitit presentatum*, without saying *probos et legales homines*, or *quod iuratores jurati et hicrati dicunt* or *presentant*. But in all indictments in inferior courts which are removed hither it is *juratores presentant et onerati, et jurati et per sacramentum duodecim probos et legales*, &c. which difference was agreed *per curiam* and the clerks of the crown side." These exceptions were all overruled because the indictment was found in Middlesex; but I defy my learned friends in this case to bring forward any case where this objection, taken upon a writ of error, was overruled where the indictment was found in an inferior court, which the Commission of Oyer and Terminer for the city of Dublin is. I fully admit, that either at the trial or after, before the inferior court, during the commission, it might have been amended. In 2 Hale, 167, it is said, "It seems requisite also to add this clause, *onerati et jurati ad inquirendum pro domino rege et pro corpore comitatus prædicti*; and if it be a presentment by a grand jury of a liberty, *ad inquirendum pro domino rege et pro libertate de S. vel repa de S.*" Hawkins, in 2 vol. P. C. lib. 2, ss. 125, 126, after stating what exactness is necessary in the caption of an indictment in respect of the jurors by whom it was found, and stating how far indictments have been quashed for the want of the words *onerati et jurati* in the caption, and for want of other words, proceeds to say, "But it is said that in the caption of an indictment taken in the King's Bench, or at the Grand Sessions, *super sacramentum suum dicunt* supply the want of the words *juratum et oneratum*," &c. [CRAMPTON, J.—What is meant there by Grand Sessions?] Your lordships will find it means the Grand Sessions of Wales, which was the highest court of criminal jurisdiction in that palatinate. *Anonymous* (1 Vent. 60;); *Rex v. Cullye* (2 Keble, 367.) Coming down from the reign of Charles to William III. your lordships will find in *R. v. Holliday* (3 Salk. 187), that an indictment was quashed, the caption of which merely stated that the grand jury were composed *proborum et legalium hominum de comitatu prædicto qui jurati et onerati super sacramentum suum presentant*, because it did not state, "that they were *onerati*, &c. to inquire for the King and the body of the county." *Davidson v. Moscrop* (2 E. 56); in *The King v. French* (2 Keb. 583); and *The King v. Greenway* (2 Keb. 110); and *The King v. Turnith* (1 Mod. 26,) because the *ad tunc et ibidem* were omitted.

So in *Reg. v. Morris* (Str. 901), more fully reported in Fitzgibbon's Reps. 266, because it did not appear where the grand jury were sworn. In *R. v. Gakes* (1 Keble, 101,) it is said that the words *jurati et onerati* are intended at *Nisi Prius*, but not in an indictment. *R. v. Morgan* (1 Lord Raym. 710,) only establishes the position that at *Nisi Prius* *juratorum et oneratorum* are not essential, but it did not establish that on a writ of error such an

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omission is not material, and in all the precedents of indictments for treason, in which the caption is made up before the prisoner is called on to plead, the averment is contained. The way in which the caption is made up in *Sayer's case* (Fost. Cr. L. 4) bears out my argument. In *The King v. Hardy* (24 St. Tr. 231), the words of the caption are, "good and lawful men of the county aforesaid, now here, sworn and charged to inquire for our said lord the King, for the body of the said county, touching and concerning the premises, in the said letters patent mentioned it is presented," &c. In *Rex v. Stone* (25 St. Tr. 1158), and *Rex v. O'Coigley and others* (26 St. Tr. 1204), the same form of caption is adopted; in the State Trials of 1817 the form of caption is not given, but in *Frost's case* the precedent is as I have stated, so that from 1741 to 1829 the precedent has been followed in England; and in Ireland, the same precedent has been followed in *The Defender's case*, *Rex v. Weldons* (26 St. Tr. 228,) counsel took the like objection, and moved at the commission to quash the indictment; and Chamberlain, J. says, it is taken for granted that the caption is part of the indictment—it is not, it is only the style of the court, where captions have been quashed it has been on *certiorari* or writs of error," showing that the objection is a good one; and the law officers of the crown thought the objection so serious that they amended the form of the caption in succeeding cases; and in the caption of the indictment found against *Kennedy and others* (ib. 355) the words are found: the captions in these cases were enlarged. In the other cases of state trials in Ireland the captions are not given, but in the year 1826 an indictment found at the Commission of Oyer and Terminer, in the case *Rex v. Hinchey and others* (Batty, 509), was brought into this court, and it was argued by Mr. Justice Perrin that the caption was bad, as stating the names of twenty-three grand jurors though the indictment was alleged to have been found by twelve, and therefore it did not appear by whom it was found. In p. 512 the caption is recited as follows:—

"Upon the oaths of twelve good and lawful men of the body of the said county of the city of Dublin, whose names here follow—(here setting out the names of twenty-three grand jurors)—all of the said county of the city of Dublin, Esquires, which said jurors being now here sworn and charged to inquire on behalf of our said lord the King, and the body of the said county of the city of Dublin, of all such matters, &c., it is herein presented," &c. That is the strongest authority, I think, which I could bring forward in support of the objection I have taken. I do not know whether it may not be argued at the other side that the caption can be amended; however, there is no motion on that subject, and I submit that if there were no other objection to this record, the judgment ought to be reversed. Secondly: As to the objection to the form of the counts in the indictment, I admit that I am bound to show that all the counts are bad, I shall therefore only apply my arguments to the objections which apply to all the counts. The indictment is framed under the recent act, making certain

crimes which are therein mentioned felony. Previously, a long train of decisions has made compassing to deprive or depose the Queen, or to levy war against her, an overt act of the treason of compassing her death; first, in the reign of Queen Elizabeth, it was held, in the *Duke of Norfolk's case*, to amount to treason: (1 St. Tr. 957.) But after the passing of the statute of 36 Geo. 3, c. 7, and of 57 Geo. 3, c. 6, it was clearly stated that no words or writings importing a compassing of the sovereign's death, were overt acts of treason: (Hale's P. C. 115.) No words or writings were overt acts of high treason unless they imported such design, or were overt acts of some design then on foot: (Fost. Cr. L.) The act of 57 Geo. 3, only made these things substantive treasons, which were before constructive treasons. In *Watson's case* (32 St. Tr. 579), it was so held by Ellenborough, and in *Rex v. Thistlewood* (33 St. Tr. 684), Lord Tenterden, in charging the grand jury, says, all attempts to depose the King from his state and title, to restrain his person, or to levy war against him, are made substantive treasons by that statute. And, in his charge to the petty jury (*ib.* p. 919,) he used the same language. Take it, then, that the statute of 57 Geo. 3, only made that substantive treason which before was constructive treason, it appears to be necessary to constitute the crime,—first, that a man should compass one of the intents mentioned in the statute—secondly, that he should publish some printing or writing—thirdly, that the printing or writing should import some compassing, or be relative to some act or design then actually taken, or intended to be taken, or about to be taken. I contend that the recent act only reduced the penalty, and that these three ingredients are necessary to constitute a felony under the recent act of 11 Vict. c. 12, and that to constitute a felony under it, the writing must be such writing as would, before the act, have been a treason. This indictment is very long, and I will say, with great respect to the Attorney-General, that such indictments ought not to be made precedents of, and that it would be more constitutional if such a mass of articles were not inserted into them as to make it almost impossible for a prisoner to defend himself, or his counsel to defend him against them. There are fourteen counts in the indictment, to two of which there are separate objections. By the 36 Geo. 3, c. 7, writings or printings were made part of the *corpus delicti*, and not merely overt acts of treason. The recent act, and that of the 36 Geo. 3, seem to be conversant with three different kinds of offences. We submit that the counts should set forth the manner in which the prisoner had compassed the deposition of the Queen, and levying war. The two last counts of the indictment do not set out the printings or writings referred to therein. In high treason it is not necessary to set out speeches and writings or printings because they do not form part of the *corpus delicti*, but are merely part of the evidence; but where, as here, they are part of the *corpus delicti*, they ought to be specified: (*Sacheverell's case*, 15 St. Tr. 466.) That was the earliest case in which the question arose, and there it was laid down

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that where they form part of the *corpus delicti*, the words must be set forth. The rule is so stated also in *Sidney's case* (9 St. Tr. 817); *Twine's case* (6 St. Tr. 533); *Zenobio v. Astell* (6 T. R. 162.) In *R. v. Lloyd* (2 E. P. C. 1122), upon an indictment for sending a threatening letter, it was held that the letter must be set out: (*R. v. How*, St. Tr. 199; *R. v. Cheese*, 4 B. & C. 902.) In *Lloyd's case* it was argued, as no doubt it will be here, that the indictment was in the very words of the statute. But the result of the case was, that the court held expressly that the letter should be set forth, that they might see that it was of the kind mentioned by the statute, and the judges were of opinion that the indictment was bad, for not setting out the letter itself. On principle, the writing should be set forth, for otherwise how could the party plead *autrefois acquit*, or *autrefois convict*, but if I went no further than the statute itself, it is clear that under it the printing or writing must be set forth. Three several modes of committing the offence are intended by the statute. The statute says, no indictment shall be maintained for open and advised speaking, unless the words shall be set forth in an information made within a certain number of days after the offence is committed. Then should the words be set forth in an information and not in an indictment? This provision, I submit, affords a strong argument in my favour, and in the 7th section of the statute of 11 Vict. c. 12, it is provided, "that if the facts or matters alleged in an indictment for any felony under this act, shall amount in law to treason, such indictment shall not by reason thereof be deemed void, erroneous, or defective, and if the facts or matters proved on the trial of any person indicted for any felony under this act shall amount in law to treason, such person shall not, by reason thereof, be entitled to be acquitted of such felony; but no person tried for such felony shall be afterwards prosecuted for treason upon the same facts." But then, how is a person to avail himself of that salutary and beneficial clause unless the printings or writings are set forth? The statute has a distinction between offences committed by open and advised speaking, and by printings or writings, and by overt acts. If I am right in my arguments no judgment on these counts could be maintained, but then I must show that the other twelve counts are open to substantial objections; the crime must consist of three necessary ingredients—the compassing in his own mind—the publishing such compassing—and that such publishing is an overt act, forwarding a design then in progress, or intended to be taken—unless the party published the compassing actually in his own mind, he could not be convicted; it is not sufficient that articles should be published tending to excite war or insurrection, unless they also expressed the compassing in his own mind, and that they were in furtherance of some design: (read the count.) The two first ingredients only are in that count. It does not import that he published the design which was in his own mind, or that the design was then actually in progress, or intended to be taken,—this is an objection in substance. We allege that one

material ingredient is omitted: we say that the indictment is uncertain in the matter by the omitting one material part of the charge, and certain in the manner in which the offence is charged. We aver that the indictment should be in this form—that the felonious compassing the said John Martin, then and there feloniously did express, utter, and declare, by then and there feloniously publishing a certain felonious printing in a certain public newspaper, declaratory of, and importing such compassings, &c.; or of and concerning a traitorous sign, then in progress, or intended to be taken. The 11 Vict. 12, has not made writings felonious which were not before reasonable. This indictment does not say “felonious printings,” where “felonious” is a word of art which must be set forth in every indictment, and it is necessary that every fact, material and necessary to constitute the offence, ought to have the word “felonious” prefixed to it, and it is not sufficient to prefix it to one part and omit it in another. *Rex v. Nichol* (7 C. & P. 541) has been adopted in this country in the case of *R. v. Green* (1 Cr. & Dix. 77,) the court held in that case, that an indictment against A. for stabbing, and which charged that B. and C. were feloniously present, aiding, and abetting, was not sufficient, because it was not averred that they were feloniously aiding and abetting; it may be true, and may be urged that the jury have found these writings to be felonious writings, and we will be told that they would have been so by the learned judge that unless the indictment contained such felonious writings they ought to acquit the prisoner; but *v. Knight* (3 Salk. 186) is an authority that the finding of the jury must not go outside the statement in the indictment: (*R. v. Horne*, 10 Wp. 682.) In *Rex v. Marsden* (4 M. & S. 165), referring to *v. Alderton*, as referred to by De Grey, C.J., in *R. v. Horne*, was held that in an indictment for a libel, the omission of the words “of and concerning W. S.” was held fatal, though in the inductive parts it was alleged that the defendant intended to defame W. S., and cause it to be believed that he had been guilty of corruption and abuse. As to the certainty necessary in an indictment, in *R. v. Cheer* (4 B. & C. 902), the principle is stated that all the judges that the omission in an indictment cannot be supplied by intendment: all that is necessary must be stated. The statute of 9 Geo. 4, provides that after verdict an indictment must contain the words of a statute are sufficient. But I submit that that statute does not apply to this case, and that it was never intended to deprive any party of a substantive objection, and that you will find it so decided by Lord Denman in *Rex v. Martin* (8 Adol. & El. 483): he says, “Surely, in an indictment for burglary, an omission to state that the house or goods were would not be protected.” Littleton, J. says the same, and the conclusion the judges came to was, that where there is a substantial averment omitted, the defect is not cured by the statute, its provisions relating to the description of the offence, not the subject matter: (*R. v. Lanauze*, 2 Cox, C. p. 362.) We say the first twelve counts are bad on these grounds, and that the 13th is bad on the ground that it does

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not set forth the writings or printings legally upon the record, and therefore that the indictment is bad for uncertainty; (*Twine's case*; S. C. St. Tr. 533, & Keble, 6.) In high treason, where writings are charged as overt acts, they are charged as traitorous. In *Rosewell's case* (10 St. T. 262), the question arose on the statute of Car. 2: the objection was taken in arrest of judgment, that the words were not alleged to be spoken of and concerning the king, and that is the objection which we state to exist here. In *Rosewell's case* (10 St. Tr. 262), the Chief Justice says, "the question is, whether the words that you have laid here be so positively affirmed to have been spoken by the prisoner and to relate to the government, as they ought to be in an indictment of high treason?" The judges took time to consider the case. They appeared to be in favour of the prisoner; but the Attorney-General not probably liking to have a decision against him, the prisoner was pardoned. The remaining objection in this case is the disallowance of the challenge. It contains nine separate averments. To that challenge a demurrer has been put in by the Attorney-General, assigning as special cause that the prisoner has not shown that the goods and chattels of felons convicted within the city of Dublin are applicable to the purposes of the borough fund, and that it is not shown that William Duff has any immediate or direct personal interest in the matter. In the court below this challenge was overruled without argument, the court having, on a former occasion, overruled a similar challenge as bad in point of form. In 3 Co. Lit. Thomas's edit. 459—60, it is stated that "a juror must be *liber et legalis homo*; that is, not only a freeman and not bond, but also one that hath such freedom of mind as he stands unsworn; secondly, he must be *legalis*. And by law every juror that is returned for the trial of any issue or cause, ought to have three properties. First, he ought to be dwelling most near to the place where the question is moved. Secondly, he ought to be most sufficient, both for understanding and competency of estate. Thirdly, he ought to be least suspicious, that is, to be indifferent as he stands unsworn; and then he is accounted in law *liber et legalis homo*, otherwise he may be challenged and not suffered to be sworn." I read that to meet the objection made by the counsel for the crown in the court below, that the statute having prescribed a certain qualification, it is sufficient if the juror has that. But Lord Coke says he ought to be "least suspicious." I am sure that the Attorney-General would not contend that a person interested in the conviction of a man would be competent to try that man for his life or liberty: (2 Hawk. P. C. c. 43, s. 28.) It hath been allowed a good cause of challenge on the part of the prisoner that the juror hath a claim to the forfeiture which shall be caused by the party's attainder or conviction. He cites 1 St. Tr. 502, which appears, on reference to the folio edition to which he refers, to be *Lord Maguire's case*; in St. Tr. octavo, 654. He was an Irish peer tried in London for a treason alleged to have been committed in Ireland; he pleaded his pri-

vilege as a peer, but the plea was disallowed, and he was arraigned before a common jury; he challenged some of the jurors on the ground that persons who expected to obtain any of his lands in Ireland were not competent to try him. After some discussion he was permitted by the court to ask the jurors if they had "adventured in the prisoner's lands?" Judge Bacon says: "Thus far I will agree, that if any of this jury be to have any particular benefit in Ireland of lands or goods by his attainder, it is good; but if the lands come to the king, and the king is no way bound to give it to any of them, it is no good cause of challenge." That is the report on the subject. It was contended in the court below that that case was no authority for the doctrine of Hawkins, and that it was the mere *obiter dictum* of a judge; but if there was no dictum on the subject anywhere to be found, I would say that, independent of any authority whatever, it would on principle be a good and valid objection to a juror. I admit that here the individual has not a direct interest, but is a member of a corporation who have a direct interest; and I shall show that that is a good objection, that the goods of convicted felons were given to the corporation by an old charter, and that the juror is a member of the corporation; and we afterwards show that he has a special interest in the matter as being liable to the borough-rate. In a challenge, what in another pleading would be double is not merely unobjectionable, but the party taking the challenge is bound to put forward all the objections which exist. Under the 12th section of the stat. 3 & 4 Vict. c. 105, the rights under the old corporation are vested in the present corporation: the principle which we submit is, that an interested person cannot be a juror or a witness. It has been held that an objection, which would be a good objection to the competency of a witness, would be a good objection to the competency of a juror. The law is even more jealous in cases of jurors than in cases of witnesses. If William Duff would not be a good witness before the recent statute of Lord Denman, he clearly would not be a good juror. It is laid down by Buller, J., that any interest which would be too great in the case of a witness would be good against a juror. In *Reg. v. Corporation of London* (2 Lev. 231), it was held by Chief Justice Scroggs that freemen of London might be witnesses on a trial as to the right of the Corporation to toll; for he said their interest was too small and inconsiderable to oblige the court to reject their evidence; the witness in the case was permitted to give his testimony, but later cases show that that case is not law now, and that if it had occurred before other judges than Chief Justice Scroggs, it would probably have been differently decided; and the case of *Dowdesell v. Nott* (2 Vern. 317), is different. In *Hesketh v. Braddock* (3 Bur. 1847), the principle was laid down that any interest in a juror, no matter how small, was an objection to him. The court below in that case overruled the challenge, on the ground that otherwise there could be no trial, as by charter both sheriff and coroner

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must be freemen, and it was agreed that the interest was too minute; but Lord Mansfield says—

“We are all very clearly of opinion that in this case neither the sheriffs nor jury were competent, and therefore the challenge was improperly overruled at the Portmote Court.

“There is no principle in the law more settled than this—that *any* degree—even *the smallest* degree, of interest in the question depending—is a decisive objection to a witness, and much more to a juror, or to the officer by whom the jury is returned.

“The law has so watchful an eye to the pure and unbiassed administration of justice, that it will never trust the passions of mankind in the decision of any matter of right. If, therefore, the sheriff, a juror, or a witness, be *in any sort interested* in the matter to be tried, the law considers him as under an influence which may warp his integrity or pervert his judgment, and therefore will not trust him.

“The *minuteness* of the interest will not relax the objection; for the *degrees* of influence cannot be measured; no line can be drawn but that of a total exclusion of *all degrees* whatsoever.”

Sir C. O’Loghlen
for the prisoner.

Here, I say that the Corporation of Dublin are interested in the forfeiture which would accrue on the conviction of the prisoner. In *Burton v. Hinde* (5 T. R. 174) the same objection was taken to a witness; it was an action of trespass for breaking the close of the plaintiff, who claimed under the Corporation of Kingston, who, being lord of the manor, had inclosed it out of certain waste lands, in which the defendant and others had a right of common, and the question was whether there was sufficient common left; to prove which a freeman was called; but Gould, J.; who tried the case, refused to receive his evidence and nonsuited the plaintiff; then, on a motion to set aside the nonsuit it was agreed, first, that the freeman had no interest at all, the rent being reserved to the mayor and bailiffs of the corporation; secondly, that the interest was too minute to operate as an objection to their testimony. *Sed per curiam*, “The rent must be reserved for the use of the corporation, and therefore the objection must prevail however small the interest may be in reality.” Following up the analogy, what would be a good objection to a juror in a civil case is a good objection in a criminal. Whether it be direct and immediate, or only consequential; one way of trying this question would be, could this conviction be used in any way by the corporation? No doubt it could be used by the corporation if the crown refused to give up the felon’s goods.

In the English Corporation Act there is a provision expressly enabling parties to be witnesses in actions for penalties belonging to the corporation; which shows that before that statute they would be incompetent witnesses, and if incompetent witnesses they would be incompetent jurors. We show the Dublin Corporation to be interested in the conviction of Mr. Martin, and we show the juror to be a member of this corporation. Secondly, we show a personal interest,—we state that he inhabits a house liable to the borough-

ate, and that when the borough fund is deficient the houses are liable to the borough rate; we show that the borough fund is deficient, and that the corporation had then a legal right to levy a borough rate.

Suppose that the corporation was deficient 5,000*l.* and that the conviction of the prisoner would give them 10,000*l.* it is clear, and it is to be taken for granted, that the property which the corporation would acquire would exonerate the juror from liability to that borough-rate, and therefore, as it will exonerate him from personal liability, he is disqualified. It will be said that the juror's interest is a contingent one, but we aver by the challenge that he is immediately and personally liable; the only case where such persons have been admitted as witnesses are where the person is remotely but not immediately liable; various statutes in England have been passed rendering competent persons liable for keeping bridges in repair, and inhabitants liable to be rated for the purpose, who were incompetent witnesses upon indictments for such repair. The 1 Anne, stat. 1, c. 18, s. 13, was passed to remedy this great public inconvenience; two years after this statute came under judicial decision. In *The Queen v. The Inhabitants of Wilts* (6 Mod. 307), it was held by the court that "one of the county is a good witness though not a good juror." That case is a complete case in point. It will be urged that here it was a certain interest, but here the juror only *might* acquire a benefit; but in *The Attorney-General v. Wyburg* (1 P. Wms. 598), it was decided that parishioners are not good evidence to prove a charity given to the parish; "the court saying, "the witness being described to be of the parish of Enfield, a freeman, must be intended an housekeeper, and *liable* to pay parish-rates unless the contrary appear" (*Barret v. The Hundred of Stoke*, 1 Mod. 73); and the same rule was made in (*R. v. Hornsby*, 10 Mod. 150), the 8 Geo. 1, c. 16, was passed in consequence of this decision; and to come down to a late case: in *Sir Henry Oxenden v. Palmer* (2 B. & Ad. 236), it was decided that a person who paid highway rate within a parish was not rendered a competent witness by the stat. 54 Geo. 3, c. 170. Upon the trial of an issue whether within that parish there was a custom that all persons residing therein, whose duty it was to cause the highways within the parish to be repaired, might take shingle from the beach for the purpose of such repair. The judge at the trial rejected the witness, and the court above held that he was right, and that the witnesses were incompetent. But, admitting the common law principle, that if a party is immediately liable to a rate, and that he will either by his verdict exonerate himself from the rate or else ease himself in the payment of it—he is incompetent as a witness and more incompetent as a juror. The inconvenience of such a decision as we seek may be suggested, but the court has only to decide upon the law as it is,—Parliament is ever at hand to remedy the inconvenience; and besides, the charter is held by patent, and if the right be found inconvenient it may be pur-

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chased, and I have no doubt the corporation would not object. It required the statute of 7 Hen. 7, c. 5, to abolish the challenge on the ground of "nothing in the ward" which disqualified the inhabitants from acting on juries; the judges, however, decided according to what the law was, and a statute was passed to remedy the inconvenience; as to the *argumentum ab inconvenienti*, the court will remember the case of *Ashford v. Thornton* (1 B. & A. 405), in which wager of battle was claimed in the 19th century, and the court decided, that by the law of the land it must be allowed. Lord Ellenborough observing, "It is our duty to pronounce the law as it is, not as we may wish it to be." The last objection to this record arises upon the form of the sentence, which is, "that he, the said John Martin, for the said felony, in the said first count of the said indictment specified and charged, be transported beyond the seas for the term of ten years from the 8th day of August instant:" we say that the entry is not sufficient because it does not mention the place where he is to be transported to, which it should have done. *O'Connell v. The Queen*, per Lord Denman (Leahy's Report; 11 Cl. & F. 155; S. C. 1 Cox C. C. 413), following out that case, I submit that your lordships cannot hold that sentence to be good unless it has been warranted by law; where the law appoints a particular punishment the court cannot add to or diminish from it: (*Rex. v. Hartnett*, Jebb's Cr. C. R. 302; *Rex v. Holland*, 2 Ir. Law Rep. 335.) In *Rex. v. Hartnett* the omission was merely as to the disposal of the body of the prisoner, and yet it was held fatal. A power was first introduced of commuting punishment to transportation by stat. 4 Geo. 1, c. 11, Eng.; 6 Geo. 1 (Irish). The 26 Geo. 3, c. 24, s. 66, is the statute which regulates the punishment of transportation, and which statute is still unrepealed. The 66th section, which is introduced into a statute containing a variety of other matters, provides that the judges of assize and justices of sessions before whom any person or persons convicted of any crime, "for which the person or persons is, or are, or shall be liable to transportation, shall and may order that such person or persons be transported either to any of His Majesty's plantations or settlements in America, or to such other place or places not in Europe as such judge or justices respectively shall order and direct, any law, usage, or statute to the contrary notwithstanding." The words "shall and may" are imperative; in England the sentence is different, because there was a subsequent statute passed, the 37 Geo. 3, c. 27, s. 2, which enables the judges to pass sentence in the form in which it has been passed here; but since the Irish Act of 26 Geo. 3, no similar act has been passed here. The 30 Geo. 3, c. 32, enables the Lord Lieutenant to send the convicted person to any place which he may think proper, but only a person who is under sentence by virtue of the previous act.

CRAMPTON, J.—Then your construction, Sir Colman, as I understand you, is that it enables the Lord Lieutenant only to change the place?

Sir Colman O'Loughlen.—In *Rez v. Kenworthy* (3 D. & R. 173), a writ of error was brought because the prisoner was sentenced to be transported. In England the power given is to transport generally; in Ireland it is to transport specially, and not naming the place is bad. In last session of Parliament an act was passed (11 & 12 Vict. c. 78), providing that a Court of Error might pass a right sentence where an improper sentence was pronounced; but it is clear that the court cannot amend a sentence passed under a discretionary power. The statute never contemplated amending a judgment but pronouncing a judgment. But where there is a discretionary power given of measuring the sentence, how can this court pass a sentence? how can it be cognizant of what passed below, of the demeanour of the witnesses, or of a recommendation of the jurors, as there was in this case? The court might, if the statute applies to this case, remit it to the court below; the statute, however, only passed on the 31st of August, but the trial took place on the 8th of August as appears by the record. The words of the statute are, "where any writ of error shall be brought," and it would be hard to give it a retrospective effect. The right to the writ of error, and the fiat for it, occurred before the statute came into operation; *Paddon v. Bartlett* (5 Nev. & Man. 383), which has been furnished to me by Mr. Napier, is in point, and this being a criminal proceeding, is an *à fortiori* case. On all these grounds I submit that the judgment in this case ought to be reversed, first, because the caption is bad; secondly, because all the counts are bad—the two latter for not expressing the printings—and all the others for the reasons I have stated; thirdly, for the disallowance of the challenge; and fourthly, for the error in the form of the sentence.

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John Perrin, for the Crown.—I shall take up the case in the same order observed by my learned friend. The form of the caption in this case is the same as that used in *The Defenders Case* (26 St. Tr.), as that always used at the Commission Court and in this court. In *Weldon's case* (26 St. Tr. 228) the same objection was made and overruled; the terms of the caption state that the bill has been presented on the "oath of good and lawful men of the county of the city of Dublin," and the court have here also the names of the jury. In *R. v. Morgan* (1 Ld. Raym. 710), Lord Holt says:—"The whole court were of opinion that it was good without saying *juratorum et oneratorum*, and he takes no notice of the distinction as to making up a *Nisi Prius* record, which had been referred to by one of the counsel in the case: (*Reg. v. Gray*, 5 Ir. Law R. 524; *Rez v. Greycor*, Sir Thos. Jo. Rep. 180; *R. v. Ambler*, 2 Keb. 59); that is the same precisely as this case. These cases are referred to in 1 Ch. Cr. L. p. 334, where it is laid down that it is not necessary to aver that they were *oneratorum et juratorum*. As to the objection that it does not appear that the jurors were sworn before the court, *O'Connell's case* shows that such averment is not necessary. As to the objection that the caption does not state that the bill was found by twelve grand jurors, it is unnecessary; for the names are set out. There is no

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difference between cases removed to this court from other courts and other cases. No decision has been made on any such distinction. Secondly, as to the objections to the form of the counts in the indictment, I submit that the counts are all good; I shall only refer to the names of the cases which establish this without going through the cases themselves: (*Thistlewood's case*, 33 St. Tr. 697.) In p. 701 of the Report will be found a portion of the indictment which will sustain the indictment in the present case. In *Hardy's case* (24 St. Tr. 231), the question was ruled in favour of the crown, and no objection was ever made to that decision. As to the objection taken that the indictment here is so long, it is not likely to occur again if the court should decide that a short form is sufficient; it then can in future be adopted, and a bill of particulars furnished: (*Emmett's case*, 28 St. Tr. 1098.) The 6th and 12th counts are precisely the same as in *Thistlewood's case*, and the stat. 11 & 12 Vict. c. 12, being precisely the same in form as 36 Geo. 3, c. 7, I submit that an indictment which has been held good under one statute will be held good under the other. As to the allegation that the counts are uncertain, I contend that, being exactly in the words of the statute, by the 9 Geo. 4, c. 54, it would be sufficient after verdict, but even independent of that statute they are good. With regard to the cases cited they are all to be found in *R. v. Marsden* (4 M. & S. 164). I submit that the articles set out all so plainly refer to the Queen as to come within the principle as laid down by Lord Ellenborough. In cases of libel, the indictment states that the defendant has published the libel against a certain party. The charge here is quite of a different nature, and different in the manner of statement, but even if they were of the same class, I submit that the counts will charge an intent to deprive and depose the Queen, and then, that in furtherance of that object he did publish certain printings, which I submit is sufficient: *R. v. Burdett* (4 B. & Ald. 314.) It has been said by Sir Colman O'Loughlen, that whenever the word printing was used in indictments for treason, the word traitorous was also used. In *Twyn's case* (6 St. Tr. 514), *Anderton's case* (12 St. Tr. 1246), *Thistlewood's case*, *Hardy's case*, and *Emmett's case*, the word 'traitorously' is used as 'feloniously' is here applied to the word 'publishing,' and then it is not applied to every particular printing mentioned. As to the objection that the publications are set out at length, it is for the advantage of the prisoner that he may have the benefit of laying the whole of them before the jury. As to the form of the sentence, *In the case of Reg. v. Patrick Commins, Patrick Quohane and another*, Easter T. 1845 (MSS. from the Crown Office), which came from the North Riding of the County of Tipperary, and was the case of a conviction for administering an unlawful oath, the ground of error alleged was, that the sentence was erroneous. I have here the judgment of the Lord Chief Justice, in which he says, that the sentence having followed the statute, it was enough; in the statute referred to by Sir Colman O'Loughlen, the sentence is confined to persons

who have been convicted of the crimes specified in that very statute. As to the objection on the ground of the challenge (*Rex v. Capper*, 5 Price, 283), the challenge does not aver that the Mayor and Commons were ever seised of this franchise or ever derived any benefit from it. Littleton, sect. 304; *Rex v. Sutton* 3 B. & C. 113; 1 Saunders, 243 (*d*) contains the averment which I say ought to have been stated.

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CRAMPTON, J.—What is the inference which you would draw from the words in the charter “within the city” as to locality?

Perrin.—What was the city then, is not now the city, portions having been thrown in, and the challenge does not aver that it occurred in a place which was then the city. [MOORE, J.—There is no allegation that the goods and chattels are now vested in them.] The challenge says that they are the same corporation, but does not show how that is to be tried: it does not show strictly how they derived. There is no allegation that the corporation under the statute of Victoria ever derived any benefit from the goods of felons; the forfeiture of fugitives’ goods is abolished by statute, so that there is an erroneous statement in the challenge in that respect. The challenge is defective in consequence of the non-user of the franchise: (Com. Dig. tit. Franchise, Cro. Jac. 155.) I cite these authorities to show the necessity of the averments of the user of the franchise. [MOORE, J.—In a proceeding for the recovery of a forfeiture, have you found any allegation by the party seeking to enforce it, that they have used the franchise, or that the non-user ought not to be replied?

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CRAMPTON, J.—You say that the mere averment that the right was granted and is now vested in them is not sufficient, and that they should have averred that it had been used?] They should have averred that the franchise was vested in them, not the goods and chattels, for until conviction, no goods or chattels could have vested in them. The next allegation is, that “the said John Martin hath within the city of Dublin certain goods and chattels of great value, to wit of the value of 20s. and that the said William Duff is a burgess of the said City of Dublin,” &c.: (1 Wms. Saunders, 275, *b*; 12 Coke Rep. 1 *b*, 2 *a*, *Ford and Scheldon’s case*.) In *R. v. Capper*, 5 Pr. 263, it had been held that *bona et catalla* do not pass the debts of a felon, so that, for all that appears to the contrary, the goods of John Martin may not have been such as would have passed under the charter. [MOORE, J.—But where the charter gives all and all manner of goods and chattels, and the challenge says that he had divers goods and chattels, is not that large enough?] The intendment in this case of a grant of a charter is always in favour of the crown and against the grantee: (*Reg. v. St. George’s Parish*, 8 Ir. Law Rep. 23.) It does not follow that what was the city of Dublin in Henry the Fifth’s time, is the city now. It is argued at the other side, that there is a possibility of a possibility; but would any man of common sense out of this court suppose that William Duff had any interest in the conviction of John Martin?

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I may be said to use very technical objections, but where such extremely technical objections are made to this juror, I am justified in pressing every objection to this challenge. In former times, (1748), and by statute, the Lord Mayor and aldermen were judges of the court, but if this challenge be right they must have been incompetent: (19 lib. Assizarum, plac. 6; Viner's Abr. tit. Trial, X. c.) There are a class of cases in which witnesses have been admitted on the ground of necessity: (1 Leach C. C. 115, p. 132: *Laxcum v. Lovell*, 9 Bing. 465.) It falls within Mr. Justice Buller's rule, a person interested will be admitted when no other person can reasonably be expected: (Buller's N. P. 289, a. & b. *ib.* 188, in note; Peake on Evid. 157, 158; Willcock on Corporations, 309; *R. v. Carpenter*, 2 Show. 47.) That case was the case of the Mayor and Sheriffs of London. It will be impossible for this court to hold that, till the passing of the Municipal Corporations Act in 1841, all the members of the corporation were incompetent to act as jurors, and that since that time all the respectable inhabitants of the city are incompetent. As to sections 179 & 180 of the Municipal Corporations Act, the court will find that the Court of Quarter Sessions of the Peace have the power of trial of many offences which are felonies; section 180 exempts justices of the peace; and town councillors are exempt and disqualified from serving on juries except at commissions of Oyer and Terminer; I submit that the charter is obsolete, and that the course of the city of Dublin for over 300 years of summoning and empannelling members of the corporation on juries is sufficient, and that even if not, that by the late statute this charter is impliedly repealed. It is a strong argument against the validity of this challenge that both in London and Dublin, both at the commission of oyer and terminer here and at the Central Criminal Court in London, such persons have been in the habit of being summoned to attend on juries.

BLACKBURN, C. J.—I shall take up this case to-morrow. It has been very ably argued by the gentlemen of the bar.

Holmes.—I presume, my lords, that in this court the counsel for the plaintiff in error will have the reply.

The Attorney-General (Monahan) insisted that he had, on the part of the crown, a right to the reply, and referred to the cases of *R. v. O'Grady*, and *R. v. Jones*, and to the recent case of *Shea and Dwyer in error v. The Queen* (3 Cox C. C. p. 141), in which he had the reply. For the plaintiffs in error the course adopted in the House of Lords, in *O'Connell and others v. The Queen*, was relied on: (11 Cl. & F. 351; 1 Cox C. C. 413.)

The COURT said they would consider the point, and announce their decision upon it in the morning.

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This morning the court stated their opinion to be, that, according to the practice of the court, the Attorney-General was entitled to

the reply. Accordingly the argument was resumed, on the part of the plaintiff in error, by

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Holmes.—As regards the objections to the caption, the case has been so very fully argued by Sir Colman O’Loghlen, that I do not feel that I can add anything to his argument except that the cases which have been cited on behalf of the crown appear to be confined to the court below, and not to apply to a court of error. With regard to the objections to the indictment, I shall not add anything to what has been urged on that subject by my learned friend. With respect to the objections which exist to the form of the sentence, the statutes which have been referred to by Mr. *Perrin* are Police Acts, but the statute on which we rely is the 26 Geo. 3, c. 24, s. 66 (Irish), which provides that “the justices of Oyer and Terminer, and general gaol delivery, the several judges of assize, and justices at sessions, before whom any person or persons convicted of any crime or crimes for which the person or persons convicted is, or are, or shall be liable to transportation, shall and may order that such person or persons be transported either to any of His Majesty’s plantations or settlements in America, or to such other place or places, not in Europe, as such judge or justices respectively shall order and direct, any law, statute, or usage to the contrary notwithstanding.” Now it is clear that the section is as general as words can make it, and is not confined to any particular offences, we therefore contend the judge ought to specify some place not in Europe. The place to which a prisoner is to be transported may make a very material difference in the nature of the punishment, and the Legislature thought it better to vest in the court the power of ascertaining and fixing the place. It would be dangerous to leave the power with the crown. It would be a very different punishment to transport a man to the Cape of Good Hope, and to Kamschatka, or Terra Del Fuego: before the statutes authorizing this mode of punishment it was unknown to the law. The crown had the power of preventing a subject leaving the country by issuing a writ of *Ne exeat Regno*, but had no right to send out of the country any subject, however mean; even convicted felons and traitors; and there are instances of persons being found guilty of offences punishable with death who, having been offered to be sent abroad as a commutation of it, have actually preferred to be executed. I submit, therefore, that this sentence being only “to be transported beyond the seas,” is imperfect; the expression “beyond the seas” is very indefinite: it is one about the meaning of which very able writers have differed, and it is a much better course that the whole sentence should be left in the hands of the judges who try the case, and are cognizant of the whole facts, than in the hands of the government. The next objection upon which I mean to rely is, the disallowance of the challenge. If the juror objected to had *no* interest in the conviction of the prisoner, that is a fair case for the crown to rely upon; but I do not think it fair to prevent that case coming before the court by technical objections. The court will in this case decide

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whether or not any interest, however small, however minute, will be a good cause of challenge in every case to a jurymen. It is said that it will lead to great inconvenience if the burgesses cannot sit upon trials, but what has my client to say to that?—it is a matter easily remedied by an act of Parliament. But the inconvenience is greatly magnified; *non constat* that the accused will avail himself of the objection, he might prefer being tried by persons of high character, who are interested in his conviction, rather than by persons of a different character, who are not interested in it. By the demurrer, all the facts necessary to raise the inference with respect to the interest of the juror are admitted. It has been objected to the challenge that the day and year of the date of the charter are not given, but it is alleged to have been given by Henry V., during his reign, and he had a right to give the franchise, for before that the goods of felons were vested in the crown. It is admitted beyond all doubt that the crown gave the then existing corporation the goods and chattels of felons and fugitives. The challenge proceeds to aver that at the passing of the Municipal Corporations Act (3 & 4 Vict. c. 108) the charter, &c., was duly vested in the then corporation of the city of Dublin, so that it is admitted on this record that all the rights and franchises under that charter were vested in the then corporation. But even if there were no allegation of the fact in the challenge, it appears by that statute that the rights and privileges of the then corporation passed to the present. It is a general statute applying to all corporations, and the court are bound to take notice of its provisions. It has been objected by my friend Mr. *Perrin*, that the goods and chattels of the prisoner could not be vested until the conviction, but the meaning is plainly that the right to the goods was vested; but I might throw overboard every portion of that allegation, and rely on it that by the previous part it is alleged that everything, which the former corporation had, passed to the present. There is then an averment that there is a borough fund, and that it is deficient. If a bill in Chancery were filed for an account the corporation would be bound to show whether there were any goods of felons and fugitives to which they were entitled, and what they had done with them: what the amount of them might have been is wholly immaterial, they must by law have gone to the borough fund and become part of it. It is now urged that this charter is at an end by reason of *non user*; but if so the objection ought to have been made by plea. But it is averred by the challenge that the rights, &c. have become vested in the present corporation, therefore they could not have been lost by *non user*, and there is an end of that objection. The question, however, might have been easily raised by a proper plea if the facts would have warranted it; but the facts being by the demurrer admitted to be as they are averred on this record, our allegation must therefore be taken to be indisputably true. The statute proceeds to provide for the application and management of the borough fund; where the state

of things exists which we aver in our pleading was in existence when we put in our challenge, the corporation would have been compellable by mandamus to raise a borough rate, and William Duff, the juror, was a burgess, and therefore interested therein. The case of *Rex v. Capper* (5 Pr. p. 217), was cited for the crown; but what does it decide—"That a grant of a liberty in a manor of goods and chattels of tenants in such manor attainted of felony is confined to the goods, &c. of felons being locally situate within the manor, and does not pass goods, &c. lying out of it;" we say here that the goods are in the city of Dublin. It is said at the other side that the limits of the city are changed, but the court cannot take judicial notice of that; we aver that they are vested in the corporation, and whether they were worth a million or one pound they would immediately, upon the pleading, as it stands, become the property of the corporation, and Duff, being a burgess, is admittedly interested therein, and therefore disqualified from being a juror. Every case in the books which goes to establish that circumstance of interest which produce incompetence of witnesses, has the same effect as to jurors. It has been said in *Laukum v. Lovell* (9 Bingh. 465), that in some cases it may be difficult to get any evidence if interest disqualifies; but that was the case of an indictment regarding a highway: now, highways are open to *all* subjects, and any person who passed that way would be an interested party; and in *Trials per Pais*, p. 378, it is said "oftentimes a man may be challenged to be of a jury that cannot be challenged to be a witness." That shows that the case of a juror is an *à fortiori* case, and that objections lie to a juror which do not to a witness. Whenever a witness was interested, however minute the interest was, he was disqualified before the passing of Lord Denman's Act, the passing of which shows the law to have been so. The few earlier cases to the contrary are decidedly no longer law if there were no other case than the case in *Burrow*, the fallacy of such is shown by this, that some men cannot be influenced by any amount of interest however great. Like Cincinnatus, some men could no more be influenced than the sun could be turned from his course; some might be influenced by a very small degree of influence, and who is to determine the amount? The judge is to be left to determine the amount it is said. The facts of the case of *Hesketh v. Braddock*, in 3 Burrow, 1498, were these:—It was alleged that in the town of Chester a custom existed to prevent strangers from exercising or carrying on any trade therein, and that freemen alone could do so. The sheriff was a freeman, the coroner was a freeman, and the jurymen were freemen. An action was brought for the recovery of a penalty for a breach of this custom, and at the first inferior court before whom the question came an objection was raised that the jury were freemen, the panels were challenged, and the polls were challenged, and both challenges overruled. It did not appear that they were men in business who could be in any way affected by persons coming into the town to

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trade, but as freemen they *might* be affected; though there was a fine imposed, it was a very small one, and it did not appear that the freemen got any part of it whatever; there was merely a contingent interest, a possibility that they might be affected. The court below disallowed the challenge, and there was an appeal from that decision to a superior court, and that court reversed the decision; from that decision again there was an appeal to the Queen's Bench by writ of error, and that court confirmed the decision of the second court, and held the cause of challenge good. Can there be a clearer and more satisfactory decision showing that the minutest degree of interest disqualifies a witness, and, *a fortiori*, a juror? One or two early cases which seem to hold the contrary doctrine are overruled (*The Case of the City of London concerning Water-bailage*, 1 Ventris, 351; 3 Y. & J. 15; *Doe dem. Stafford v. Tooth*; *Mayor and Bailiff of Manchester v. Phillips*, 4 Ad. & El. 550; *Brown v. Corporation of London*, 11 Mod. 225); the witness being objected to as a freeman, a judgment of disfranchisement was produced, but it appearing that he had never been summoned, Holt, C. J., said, "he would not admit the man to give evidence because the judgment in the Mayor's Court may be avoided." (Willcock on Corporations, 310, pl. 307; Phillips on Evid. p. 48.) But it has been settled that a corporator is not a competent witness to prove a custom of excluding strangers from trading where a moiety of the penalty goes to the corporation, though the moiety in that case had been granted away by them (*Davis v. Morgan and others*, 1 Tyrwh. 457); those are all cases of objections to the competency of witnesses; they are of course all subject to the exception of necessity. Jurors are more potent than judges. Judges can only expound the law to the jury, but the life or death of the prisoner are not in the judge's hands—the jurors are to decide. And it is contrary to the principles of the constitution that an interested juror should have the power of deciding on it; it is contrary to the principles of eternal justice. This is a principal challenge, and not to the favour (Coke Litt. 157 (a); in 2 Dyer, 176, (a) plac. 27.) A juror resided within the plaintiff's leet and made suit once a year without any other tenure. It was held by all the judges of both benches, except two, that the juror was incompetent, and that it was a principal challenge: (Coke Litt. 147 (b); *ib.* 157 (b); 3 Bac. Abr. 157; tit. Juror, letter E.) It is a good cause of challenge that the juror have a claim to the forfeiture: (Hawk. ch. 43, sect. 48.) *Lord Maquire's case* (4 St. Tr. 654) is a very strong case in my favour. It was a very remarkable case; he insisted that, his lands having been sequestered, none of those who had bought his lands might pass upon his trial, and demanded that they might make answer upon oath whether any of them had "adventured or no." It was objected by the counsel for the crown that such a challenge was not warrantable. Judge Bacon says: "thus far I shall agree, that if any of the jury be to have any particular benefit in Ireland of lands or goods by his attainder, it is good;

but if his lands come to the king, and that the king is no way bound to give it any of them, it is no challenge: look to the statute." Mr. Prynn objected that it did not appear to the court that the prisoner had any lands or goods in Ireland, and that, therefore, the question ought not to be put. But it appeared clearly on that trial that the judge on that trial (and he was no great friend to the Irishman who was then on his trial), decided that if a juror had any interest in his conviction it was a good cause of challenge, for he allowed the question to be put, and the jury were required to answer upon oath whether they had adventured, or had any share in Ireland for the rebel's land." In *The Queen v. The Inhabitants of Wilts* (6 Mod. 307), which was an issue, whether the county of Wilts or town of L. were obliged to repair the bridge of L. within the county, several resolutions were come to by the court in that case, the sixth of which was, "that one of the county is a good witness in the case, though not a good juror." Now, the reason why they held that the witness was competent was the statute of 1 Anne, c. 18, s. 13, from which it appears that the Legislature were obliged to pass an act of Parliament for the purpose of making inhabitants, who were liable to repair the highways, competent witnesses, but the court held that it was a good objection to a juror: (19 Johnston's Rep. 115, an American case.) It was insisted by Mr. Perrin that the 179th section of the Municipal Corporations Act met this objection, but it does not touch this case at all; there are not any words in it that comprehend Courts of Oyer and Terminer. The fact of the statute making those persons referred to competent in certain cases, shows that they are not competent jurors here. There is no doubt that every burgess in the world may sit on any trial, if not objected to, and the prisoner may waive his right; but the statute does not qualify the party if objected to, for if it did, it would qualify him no matter what the amount of interest, whether personal or not, or however great. *The King v. Carpenter* (2 Show. 47,) bears against the crown. It was held there, that in an indictment to compel a man to repair a public bridge or way which he was bound to do, the inhabitants of the county were competent on the ground of necessity. But in a hue-and-cry action against a hundred it was held that the inhabitants could not be witnesses: (*Barrett v. The Hundred of Stoke*, 1 Mod. 73.) On these grounds then, in addition to what has been advanced by Sir Colman O'Loughlen, I submit that there is no objection to the challenge in point of form; that it appears, decidedly, that William Duff was not merely a member of the corporation having this borough fund, but also that he was personally liable to pay the borough rate, and therefore, that no matter how small his interest, being interested, Mr. Martin was entitled to object to him as a juror, and that the challenge ought to have been allowed.

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The *Attorney-General* (Monahan) in reply.—I have now, on behalf of the crown, to submit to the court the reasons which

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occur to me why the judgment of the court below should be affirmed. First, I shall apply myself to the question upon the caption. It appears by the caption that this was an adjournment of a commission. It appears to have been holden on 8th of August, and in the body of the county of the city of Dublin; it was not an ordinary one, but holden under the Queen's letters patent. It then goes on to say that the indictment was found on the oaths of good and lawful men of the county of the city of Dublin. The objection to this caption is, that the grand jurors should have been stated to be *jurati et onerati*. It is a little remarkable that it is conceded that a caption such as this would be quite sufficient in the case of a caption from an inferior court removed by *certiorari*. It would have been sufficient if the bill had been found at the grand sessions in Wales or Chester. But it is sufficient here also, for it appears that the indictment has been found before a competent tribunal, and upon the oaths of good and lawful men of the county of the city of Dublin, and the time and place of the holding of the commission is stated. But this case is concluded by the authority of some of the cases which have been cited by Sir Colman O'Loughlen, and which are not liable to the objection upon which he relies to distinguish them. In *Rex v. Ambler* (2 Keb. 59), it is said error was brought because in the caption an indictment was said to have been found *per sacramentum duodecim*, without saying *onerati et jurati*, &c., *pro corpore* of the East Riding, which, *per curiam*, is well enough, and *per Twisden, William's case*, wanted (*dicunt*) *supra sacramentum*; and Keeling, Ch. J., conceived *per sacramentum duodecim prob. &c. hominum*, is well enough, without saying *onerati et jurati ad inquirendum*." I do not know how the authority of that case can be got rid of. As to the cases of proceedings removed from an inferior court after judgment, it is idle to say that this case is open to the answer given to it at the other side. I do admit that some of the cases appear to decide that though the bill was said to be found upon oath, the caption ought to have stated the jurors to have been *jurati et onerati*. In *Rex v. Greycor* (Sir Thomas Jones, 180), upon a motion to quash an indictment for the omission in the caption of the word *jurati*, the court said it was supplied by *super sacramentum suum dicunt*. Now, I ask, is not that an authority in point? There is also the case of *Rex v. Morgan* (Lord Raym. 710), and though it was removed from an inferior court, it was not decided on that ground. Mr. Broderick there suggested a reason which I cannot see anywhere else decided. Holt, C. J., said, that the whole court were of opinion that the caption was good without *juratorum et oneratorum*. I do not mean to say that the court are to take the law from text writers, but I refer to them to show the opinions entertained on the subject (Gabbett's Cr. L. p. 281), and in 1 Starkie, Cr. L. 236, it is said the caption must further show that the indictment was found by twelve jurors of the county, city, or place for which the court was

holden, and "it should appear that they were 'sworn and charged,' but it has been holden that the omission of the latter word will not be fatal." In 1 Chitty's Cr. L. 334, it is said the jurors are further described as sworn and charged to inquire for our said lord the King, and the body of the said county. Formerly, indeed, it was considered to be necessary to prefix the words "then and there" to the word "sworn," but they are not now usual, and indeed if the words "by or upon their oaths" be introduced, the omission of the whole clause will not prejudice. But there is a further answer to this notable objection,—that this record has been returned to this court this term; no such objection can be successfully taken until after the term, and during the same record will be amended as a matter of course (*Anonymous*, 6 Mod. 221; *Falkner's case*, 1 Saund. 248), the mistake of the clerk may be amended in the same term. The cases upon the point are reviewed in *Rex v. Atkinson* (3 Bro. P. C. 517). It was decided in that case that the caption can be amended; everything which is the mistake of the officer may be amended; everything except what the jury have actually found, and I have no doubt that if I applied for leave to amend this record, that your lordships would grant it: (Com. Dig. tit. Indictment, pp. 526-7; edit. 1822.) It has been stated that every objection should be attended to, however captious, but with reference to the law of the court, I shall refer to the remarks of the late Chief Justice Pennefather, with regard to such objections. In *Reg v. O'Connell* (7 Ir. L. R. 341), in which he states that such technicalities which tended rather to defeat than to promote justice, were to be discouraged, which opinion is, as his lordship stated, confirmed by those of Lord Hale, Lord Kenyon, Lord Ellenborough, and Lord Mansfield, I trust, therefore, that with reference to the caption, the court will be of opinion that there has been no valid ground of error assigned. Secondly, it has been contended that the indictment is bad in arrest of judgment. But on reference to the 36 Geo. 3, c. 7, it does not seem to me to have done merely what, at the other side, they say it has: they say it only makes certain things constructive treasons, but it does more, it makes several new things treasons. Before that statute, compassing the death of the Sovereign, or actually levying war, were the only treasons. It is a great mistake to suppose that constructive treasons were the only treasons introduced into that statute. It is reasonable in considering what would be good counts under the stat. of Victoria, to consider what would be good under the treason act. But if there was no precedent at all on any similar statute, and a man was called on to describe an offence within the recent statute, he would describe it as it has been done here, following the precise words of the statute. The prisoner having been charged with compassing to deprive and depose the Queen of the style, honour, and royal name of the imperial crown of the United Kingdom, and to levy war against her, and with having expressed such felonious compassings, by feloniously publishing certain printings or writings. In all the

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arguments used at the other side, there is no allegation, no pretence, that the publications are not of a nature clearly evidencing and expressing those intentions. The learned counsel have referred to cases of libel, and say we ought to have gone further, and to have said that he feloniously expressed his felonious compassings by a felonious writing or printing. But there is no precedent for such an argument, and it might as well be said that, if a man were indicted for having feloniously struck another, it would be necessary to aver that the stick or stone with which the blow was inflicted was a felonious stick or stone; the felony is the act of the mind. We say that the fair meaning of the documents which we have put forward is, that they express, utter, and declare such compassings as we have charged, and therefore that the case comes within the statute, and I need hardly rely on the position which has been argued by my friend Mr. *Perrin*, that under the stat. of 9 Geo. 4, after verdict this is no objection at all, the offence having been described in the words of the act; *Reg. v. Martin* (8. Adol. & Ell. 483), does not decide this question; it was a case of an indictment for obtaining goods under false pretences, and it did not appear whose property the goods were. It is only necessary for me, upon this argument, to refer to four of the counts; the 1st states that Mr. Martin feloniously did compass, imagine, invent, devise, and intend to deprive and depose the Queen from the style, honour and royal name of the imperial crown of the United Kingdom; and, following the words of the statute, we say that the felonious compassings, &c. he the said John Martin, then and there feloniously did express, utter and declare, by then and there feloniously publishing certain printings in a certain number of a certain public newspaper, setting out the printings; we then, in another count say, that he did feloniously compass, &c. to levy war against the Queen, and his intention did feloniously express, utter and declare, by then and there feloniously publishing certain printings, in a certain public newspaper, setting them out as in the first counts; then, considering these publications as overt acts, in another count referring to them without setting them out, it is alleged that they are overt acts of compassing to deprive and depose the Queen, and in like manner in another count they are charged with being overt acts of compassing to levy war against Her Majesty: (*Rex v. Marsden*, 4 M. & S. 164.) The precedents of indictments in the English treason cases contain counts similar to some of those in the present indictment: (*Thistlewood's case*, 33 St. Tr. p. 697; *Watson's case*, 32 St. Tr. p. 10.) I am charged with oppression on the one hand, because in two of the counts of this indictment I do not set out the publications; and because in the other counts I do set them out, I am charged with being oppressive. It would, I submit, be much better for counsel to apply themselves to the law of the case and not to cast imputations on a person in my situation, whose only object is to discharge his duty faithfully between the crown on the one hand, and the subject on the other.

[CRAMPTON, J.—You are placed in this difficulty, that if you set out all the articles in every count the indictment will be too long, and if you do not set them out, it will be said that it is too short.] Precisely so: the cases of libel which have been cited are not in point; can any other meaning possibly be suggested to these publications than that which has been charged? The indictment therefore is well enough; and the record, as it stands, contains, I submit, and as was decided in *Rex v. Horne* (Cowp. 689), “all facts and circumstances necessary to warrant the conclusion of the jury. And that it likewise contains all facts and circumstances necessary for the information of the court to give their judgment upon the occasion.” *Rex v. Burdett* (4 B. & Ald. 95), is to the same effect. I submit that every count in this indictment is good, even the last counts, and that I am not bound to set out all the words of these publications. Thirdly, as to the objection that the sentence in this case is erroneous as not specifying to what particular place the prisoner is to be transported, I believe that if this objection be held good every single sentence which has been pronounced by every judge on the Irish Bench for the last twenty or thirty years has been erroneous. The case of *Holland v. The Queen*, and *R. v. Hartnett* (Jebb’s C. C. R. 302; 2 Ir. Law Rep. 335), merely decided that “where a sentence is bad, it is bad in part, it is bad in the whole, and must be reversed.” I deny that the 66th sect. of the statute 26 Geo. 3, c. 24, takes away all power from the Lord Lieutenant, as regards the place of transportation. By the act of 30 Geo. 3, c. 32, s. 1 (Irish), passed in order to render transportation more easy, it is enacted “that it shall and may be lawful for the Lord Lieutenant or other chief governor or governors of this kingdom for the time being to cause all felons and vagabonds who now are or shall be under any sentence, rule, or order of transportation, to be transported and conveyed to such part or parts beyond the seas, and in such manner as the Lord Lieutenant or other chief governor or governors for the time being shall think proper, any law or laws to the contrary notwithstanding.” It never was intended that a judge should sentence a prisoner to be transported, suppose to Botany Bay, and that the Lord Lieutenant should send him to Bermuda. [MOORE, J.—Would not the language of that section import a power in the Lord Lieutenant to alter a sentence already passed?] I would say not, only to carry out a sentence. [MOORE, J.—Would not the words “who now are or shall be” refer to sentences actually passed?] I think not. But, however, by the statute of 11 Vict. c. 12, the sentence specified is that the prisoner be “transported beyond the seas;” the sentence here is in the *very terms* of the act, and if the sentence were otherwise than as it is, it would be contended that it was erroneous. But even if there was an informality in the sentence, the court here could, under the recent statute (11 & 12 Vict. c. 78) now revise it and pass the right sentence. It is said that the judges here know nothing about the facts of the case; but the court would either give the

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judges who tried the case credit for having passed a proper sentence, or else would take means of informing themselves upon the facts, as in cases of misdemeanor tried at Nisi Prius. If there be any thing in the point, it appears to be one by which the prisoner would take nothing, for the court might revise the sentence and specify the place; and then, if their argument be right, the moment the place was specified the Lord Lieutenant might alter it. As to the fourth objection, that to the competency of the juror William Duff, there are about twenty thousand burgesses in the city of Dublin, and persons liable to the borough-rate, and the goods of Mr. Martin would have to be divided into the minutest portions to give him any interest. It is said that the property of the prisoner, to the value of twenty shillings, would go to increase the borough-fund. In this case the twenty thousandth part of this sum is to be held to amount to an interest sufficient to exclude, not only Mr. Duff, but also any other householder in Dublin from sitting on a jury in Dublin upon the trial of a person accused of felony. Upon the question of interest some authorities have been cited; *Lord Maguire's case*, 4 St. Tr. 653; and 2 Hawk. P. C. c. 43, s. 28, who refers to it; but the case is not in point; he alleged the persons who were going to sit upon his trial had got direct grants of his lands from the crown, and Judge Bacon allowed the question to be put to the jurors, and it appeared that they had not got them, and that it was only his idea. The charter which is in question here is the same as the charter of the city of London, and we all know that from the earliest times the sheriffs were members of the corporation, and that they were the persons who returned the jurors; but whatever would be a principal challenge to the sheriff who returned the panel would be a ground of challenge to the juror. The objection would also render the Lord Mayor incompetent to sit as a commissioner, but the commissions from the very earliest commission down to the present time name the Lord Mayor as a judge; each of the judges here have the same interest in the conviction: every subject is, according to the arguments used on the other side, interested in the conviction of a felon, for the forfeiture of the goods of felons forms part of the casual revenue of the crown, and would go to diminish the burden of general taxation, and the very extent to which this objection goes shows its absurdity. The case of *Hesketh v. Braddock* (3 Bur. 1847), has no more to do with the present case than any other case to be found in the books. Is there a single case in favour of such an objection in which the subject-matter of the suit was not for the recovery of the property in respect of an interest in which the party was held to be incompetent? The case of *Burton v. Hinde* (T. R. 174), is not in point: it was the case of a corporation, an action of trespass *quare clausum fregit* brought by the plaintiff who was tenant of the corporation, and the witness whose testimony was rejected was a freeman of the corporation to whom the plaintiff paid rent, the defendant claiming an interest in the premises adverse to the right of the cor-

poration. There have been a great many other cases referred to, but they were all cases of proceedings instituted to recover the property of corporations [MOORE, J.—Or to assert a right], or to assert a right to property, and according to the law when those cases were decided corporate property was private property; they could dispose of it as they pleased, and I can very well understand why a member of a corporation may be incompetent; the corporation might give their property to any of their fraternity, but, by a recent statute, corporation property is no longer private. *Rex v. The Inhabitants of Wilts* (6 Mod. 307), is not in point, for there the inhabitants were the defendants. It has been urged that some cases decide that persons rateable to parish property are incompetent in suits where the parish is concerned, but Mr. *Perrin* has cited cases which show that where parties are liable to a future rate they are not incompetent: the charter as set out is, that they should “have all and all manner of goods and chattels of felons and fugitives to be condemned or convicted within the said city of Dublin, and the liberties thereof thereafter arising. The question is, what is the meaning of the words “thereafter arising?” The meaning, it appears to me, must be the gift of such of the goods of felons as were within “the city of Dublin,” referring to the locality of the goods, not of the conviction. [PERRIN, J.—Mr. *Attorney-General*, you said some of those cases cited were actions for the recovery of property; now, suppose this was an action for the recovery of corporation property—suppose, before the corporation act of 3 & 4 Vict. had passed, would you say that this juror was competent?] I should say he would be. If this interest were to disqualify, it would be impossible to have any jury upon a trial for felony within the city of Dublin, because a man to be a competent juror should be an inhabitant and liable to a certain amount of taxation; now it is very strange that if such minute challenges have been taken from time to time as are given in *Viner’s Abridgement*, no such objections have been taken in the corporation of London, the charter of which is well known to be similar, and if there had been any question of the kind raised no doubt there would have been some notice of them to be found; also, as Mr. *Perrin* suggests, there has been held to be in some cases a difference where the Crown is concerned. [MOORE, J.—That is a part of his argument.] On the grounds of public policy a man is allowed to be a witness in a prosecution although he was to receive a reward from private individuals or from the government for giving evidence to prosecute, and why? because, otherwise, certain offences would remain unprosecuted and unpunished. Every person is interested in the conviction of felons. It is alleged in the challenge that the borough fund is not sufficient for the purposes of the act. But it does not state what the purposes of the act are for which it is not sufficient; there are several purposes mentioned in the act for which it is not lawful to put on a borough-rate, as paving and lighting; besides, there is nothing in the challenge to show that a borough-rate has been put on, and therefore it is only a liability to a future rate, and not ground of incompetence.

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JOHN MARTIN, [MOORE, J.—Mr. *Attorney-General*, would you say, in the case
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 v. money, that in such case a creditor, who had a chance of being
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 of *Nowell v. Davis* (5 B. & Ad. 368), it was held that in an action
 against executors for a debt of the testator, a person entitled to
 an annuity under the will is not disqualified by interest from
 giving evidence for the defendants.

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BLACKBURNE, C. J.—In considering the different grounds of error which have been assigned in this case, I shall take them in the order adopted in the arguments at the bar. The first is the caption of the indictment, which is contended to be defective in not stating where and before whom the grand jury was sworn; in not stating that they were sworn and charged to inquire for our lady the Queen, and the body of the county of the city of Dublin; and in not stating that the indictment was found by twelve good and lawful men of the city. It is to be observed that the caption is not a pleading nor any part of the indictment. It is a statement of the proceedings, and should describe the court where the indictment was found, the time and place it was found, and the jurors by whom it was found, with sufficient certainty. The crown contends that this caption does so, and such is our opinion. It states an adjournment of a commission of Oyer and Terminer; that it was held on the 8th of August, at Green-street, in the county of the city of Dublin, before commissioners appointed by commission under the great seal, and that at that adjournment it was presented on the oaths of good and lawful men of the said county of the city, naming twenty-three, that Martin committed the felonies of which he was afterwards convicted. The question is, does this caption afford the required certainty? First, it states a presentment on oath, in court that day, and before these commissioners, so that this oath must have been there and then administered and taken, and the supposition suggested that it might have been administered by some other court, on some other day, is absolutely repugnant to the plain meaning of these words. Next, it is objected that the words "sworn and charged," which are used in the common form, are here omitted. In support of the objection, many cases, most of them in the reign of Charles II., have been cited and relied on. Were we constrained by their authority we should act on it with reluctance, considering, as I have said, that the caption is not a pleading, but a copy of the entry of the proceedings made by the officer of the court, and also considering that we have here a presentment on oath, by a jury of the county of the city, of a crime committed in the county of the city. But the formality of this caption, which is in accordance with the precedent in the case of *The King v. Weldon*, in this very same commission court, is supported by three distinct authorities. In the case of *The King v. Morgan* (1 Lord Raym. 710), there was

an indictment for riot removed into the Queen's Bench, and afterwards tried at the assizes. There was a motion of arrest of judgment, and there, where the ground of that motion was the omission of the words "sworn and charged" in the caption, Holt, C. J., says, that the whole court was of opinion that it was good, although the words "sworn and charged" were omitted. And the case of *The King v. Greycox* (Sir Thomas Jones, 180), was on a motion to quash an indictment for the omission, in the caption, of the word *jurati*, and the court held it supplied by the words *supra sacramentum*. And in 2 Keble, p. 59, *The King v. Ambler*, the case came before the court on a writ of error, and the indictment was there *supra sacramentum*, and it was objected that it was not *onerati et jurati*, and it was there held to be sufficient. Twisden saying in the case that was cited, *Williams's case*, the words *supra sacramentum* were omitted. Besides this, it is, as far as the opinions of text writers can be referred to or relied on at this day, considered that if it appears that the finding was on oath, it is sufficient, though the words "sworn and charged" be omitted, and for this several text writers have been cited. The last objection is, that the indictment is not said to be found by twelve men. This has scarcely been relied on, because it is answered by the fact that there are twenty-three names, although their number is not stated. We are, therefore, of opinion that the first cause of error must be overruled. The second class of objections is to the counts of the indictment. The two last of them, that is, the thirteenth and fourteenth, are objected to on the ground that they do not set forth the writings which the indictment charges as overt acts of the compassings stated in those counts. It is not necessary to decide on this objection, and I pass it by, merely observing that the counts here are conformable to the precedents of indictments for high treason under the English act of the 36 Geo. 3, of which the act of the 11th Vict., on which the present indictment is founded, is a literal transcript, and no objection ever appears to have been made to any of those counts, so framed on the similar enactments of the statute of the 36 Geo. 3.

But we think the other counts of the indictment are not open to any of the objections that have been made to them. They severally charge that the prisoner did feloniously compass, imagine, invent, devise, and intend to deprive and depose our Sovereign Lady the Queen from the style, honour, and name of the imperial crown of the United Kingdom; and the said felonious compassing, imagination, device, and intention, did express, utter, and declare, by then and there feloniously publishing certain printings in a certain number of *The Felon* newspaper, one of which is as follows.

This is in the exact terms of the statute, and it is contended by the crown to be therefore sufficient. But it is objected that in pleading, it should have been further averred that there was some particular design imported by the article published, and in prosecution of and in reference to which it was published, and that it

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should have stated that it was published "of and concerning" that design. I confess I do not see how more could have been done than is found in this indictment. The crime is to depose the Queen. The expression of that design and the means used, that is, the overt act to effectuate it, are the publication of the articles, and on its contents must depend whether it is such as to evidence that design and tends to its effectuation,—and no question has been raised that it does both.

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Nothing can be more clear than the language of the pleading and of the statute. The design, the evidence of it, and the act done in pursuance of it, are clearly and explicitly stated, and no other design need be stated, if, indeed, it were possible to do so. The cases in which the prefatory words "of and concerning" some matter or person are required, are cases of libel and oral slander, in which words written or spoken require inuendoes to explain their object and application, when these are not plainly expressed. But this is not a case where the design or intent of the publication is left at large or to conjecture. For here the charge is made. It is a compassing to depose the Queen, and it is expressed by the publication of these articles, so that all that would be required, even if the case before us were strictly analogous to the case of libel or slander, is in substance contained in the present indictment, and there is not, as my brother Perrin suggests, a single inuendo in reference to any of these publications, not a single instance in which it was necessary to explain the object or the intention by the insertion of an inuendo.

It was, in the second place, objected that the publications should be said to be felonious. I do not see how, in propriety of language, those publications could be called felonious. The word "felonious" is properly descriptive of the intention with which means are used or acts are done, but the instruments used, the gun for instance, with which a murder is committed, and here the articles which are proof of the felonious intent of the publisher, can be called felonious only by a misapplication of the term.

The act done by the prisoner, namely, the publication, is properly stated to have been feloniously done by him, and this satisfies all the law requires. We are, therefore, of opinion, that all these errors assigned on these various counts should be overruled.

The third error assigned, is the disallowance of the challenge for cause of William Duff, to which challenge the crown demurred, and which demurrer the court allowed. I need not here repeat the words of the challenge; it is this in effect, that the juror being a burgess of the corporation of the city of Dublin and a ratepayer had an interest in the conviction of the prisoner, Henry V. having granted to the corporation the goods and chattels of felons within, or, as has been contended, convicted within the city. Various objections have been made to the form of this challenge. Were it necessary, we should consider them in detail, and some of them are of a very serious character, but as we think the challenge should be disallowed on its merits, I shall not intimate any opinion

upon these defects in form which have been suggested at the bar, to one of them I shall have occasion particularly to refer; I mean that which relates to the enjoyment of this franchise.

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This challenge contains double matter, first, it suggests an interest in the juror as a burgess of the corporation, and, secondly, an interest as a ratepayer in the county of the city of Dublin. Taking these separately, I shall inquire first what interest has a burgess as such in the forfeiture consequent on the conviction of a felon? I can discover none. The goods and chattels forfeited will belong to the corporation: can he have any share of or personal interest in the goods so forfeited? They are all dedicated to public and specified purposes; the corporation is but a trustee to see to their application to these purposes, and even this application and disposition is confined to the council, to the total exclusion of the burgesses. My Lord Chief Baron, in pronouncing the judgment of the court below, in which Baron Pennefather concurred, speaking on this particular objection, says—"The objection is, that he is not indifferent as he stands unsworn, and not indifferent, because he has an interest in the subject-matter of the proceeding, that is, because he has an interest in conviction in order to obtain a benefit from the goods. The Municipal Corporations Act, whether it does or does not vest the property in the lord mayor, aldermen, and burgesses at large, does unquestionably vest the whole control of the property and entire management of it in a select body, which the act of Parliament creates; and although the burgess may, as an individual, compose a part of the entire corporation *quâ* burgess, as a burgess he is not entitled to do a single act for the disposal of the property which may be the subject-matter of recovery under the right to obtain the felon's goods. The town council alone are invested with the authority to dispose of them; and although the entire corporation may be nominally the trustees, yet even in the capacity of trustees, the effective power is vested in the town council. Looking, then, at that condition of things, and looking to the circumstances in which burgesses stand, looking to the enormous inconvenience that must necessarily result from any other decision, it appears to me we ought to hold in this case that the juror is not disqualified by the fact stated in the challenge, and, therefore, we ought to allow the demurrer, and overrule the challenge." In every part of the judgment of that eminent judge I entirely (and so do the rest of the court) concur. These reasons which I have just stated, with that I have already assigned, satisfy me that as a burgess this juror was not liable to any objection. The next question is, was he interested as a ratepayer? The challenge states that the goods and chattels of felons are applicable to the purposes of the borough fund, and that William Duff is a burgess, and an occupier and tenant of certain hereditaments liable—that is, as the counsel for the prisoner contend—presently liable to be rated to a borough rate, and that the borough fund, after the payment of all debts of the whole corporation and satisfaction of all lawful claims on the real and personal

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estate of such body, is not sufficient for the purposes in the act stated. The result that we are called on to infer is, that William Duff has an interest in the forfeiture, as the goods forfeited go in ease and reduction of the rate to which he is so liable. The authority mainly relied on in support of this challenge is a passage in Hawkins's Pleas of the Crown, in the following words:—"It hath been allowed a good cause of challenge on the part of the prisoner that a juror hath a claim to the forfeiture which will be caused by the party's attainder or conviction." When this passage was cited in the court below, the authority for it not being at hand, my Lord Chief Baron observed: "In Hawkins it is alleged as a ground of challenge that the juror has a claim to the felon's goods; I must, I think, consider that to signify a direct and immediate interest in the subject-matter of the trial." Now that the authority is before us, his lordship's opinion of the author's meaning is most fully confirmed. That authority is *Lord Maguire's case*, in the 4th volume of the State Trials, and there the matter of objection suggested and allowed as a challenge was, that *Lord Maguire's* lands had been actually sequestered, and that the juror had obtained a grant of them. In such circumstances nothing can be plainer in justice and in principle than the incompetency of such a person to serve on the jury. The case of *Hesketh v. Brad-dock* (3 Burrows, 1847), and several passages from the judgment of Lord Mansfield were also strongly relied on in support of this challenge; in that case, the ground of objection was that the sheriff who returned the jury, and the jury who tried the case, were freemen of the city of Chester; the action was an action of debt on a by-law made to enforce a custom that none but the freemen of that city should carry on trade in the city of Chester, Lord Mansfield says—these passages were not cited—"Every freeman"—and, indeed, it is quite obvious—"was interested in the issue to be tried; the exclusion of foreigners is a monopoly in the freemen themselves; therefore, every freeman had an interest and bias of and in the very issue to be tried in that case." The very object of the suit, it is quite manifest, was to assert and establish the rights of the sheriffs and the jurors themselves. In this and the various other cases of the objections to witnesses which have been cited and which I have examined, there was an actual present and immediate right claimed or vested dependent on, and to be affected by, the result of the depending suit or action. But to see if these cases, or any position established by them, have any sort of application to the case before the court, let me now inquire into the exact character and nature of the interest which the challenge alleges to exist in the present case. The allegation is, that the borough fund, after the payment of the whole liabilities of the corporation, is not sufficient for the purposes in the said act mentioned. This, it is contended, shows a present and immediate liability in the juror to be rated for the borough fund; and, therefore, sustains the allegation that the juror is now liable to be rated for the borough fund, in the words of the challenge. But this is not so. The

133rd section of the Municipal Corporations Act makes it imperative on the council in the first instance, as an essential preliminary to the right, to impose any rate, that they shall estimate as correctly as may be what amount in addition to the fund will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this act. This estimate is not averred to have been made, and never may be made, and until made, the amount of the rate is not ascertained, nor can a rate exist at all in law. So that it is purely casual and contingent whether the juror will ever be liable to be rated. But, again, the borough fund, by sect. 128, is declared to consist of the rents, issues and profits, of all hereditaments, estates and tenements, and the annual proceeds of money due, chattels and valuable securities. Now, it is manifest that income derived from such and so various sources may and must fluctuate. It may now, though insufficient, increase, and be quite sufficient before the preliminary inquiry and estimate are made; so that it does not follow that because when the challenge was made there was a deficiency, there may not be ample means to supply that deficiency before the ascertainment of its amount, and, therefore, before any legal rate can be made at all. Again, the goods of a felon are not forfeited until judgment; and in the time intervening between the challenge and his conviction he might dispose of all the goods that he possessed at the time of the challenge; so that, *non constat*, though he may have goods now, he will have any hereafter liable to forfeiture; but, in addition to this, it is possible that the juror may die or cease to be a proprietor of rateable property before a rate is imposed. Without ascribing any value whatever to the uncertain and indefinite amount of the liability which is contended to exist, the reasons which I have stated satisfy my mind that it did not exist at all, and is altogether ideal. Were the expectation of advantage to the juror, from the grant of the felon's goods to be accurately expressed, it would be in such terms as these: that his rate will be lessened, provided the town council shall have hereafter a right to impose any rate, and provided they take the steps prescribed by law for the purpose of enabling them to make one for the purpose, provided the juror shall live until a rate be made, and provided he does not dispose of his rateable property in the meantime; and, finally, provided the prisoner do not dispose of all his chattels before conviction. To my apprehension it is utterly impossible to discover, describe, or define any actual interest in the result of a suit which is to depend and arise on such a series of contingencies as this. I am, therefore, clearly of opinion that, rightly understanding the matter of this challenge, there is not any resemblance between this and any decided case where an objection to a juror or witness was allowed on the ground of interest; nor do I think there is any authority or position to be found which can warrant us in holding that this juror did not stand indifferent as he stood unsworn. But were it true, as I have shown it is not, that this challenge averred matter that proved the juror's

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present liability to be rated, there is authority to show that this liability would not, unless he was actually rated, be a ground of incompetency. Authority establishes the distinction between present and actual interest and that which is future and contingent. The authority I refer to is the case of *The King v. Kirkford* (2 East, 559). There an objection was made to a witness on the ground that he had rateable property, but he was not actually rated, and Lord Ellenborough gives us these words:—"To disqualify a witness on the score of interest, it must be an actual existing interest at the time, and not merely one that is expectant. The rule is well laid down in *The King v. Prosser*, that a liability to be rated is no objection to the competency of a witness. Here it was perfectly contingent at the time whether the witness would be interested or not." What were the contingencies to which Lord Ellenborough referred. Not such as exist in the present case; but the simple contingency that he might die, or part with his property, before the making of the next rate. And in the case of *Marsden v. Stansfield* (7 B. & C. 815), the issue was to try whether a certain tenement was within a chapelry, within which the witness had rateable property; yet he was held to be competent, because he was not actually then rated, though on a future occasion he might be so. In considering and disposing of this challenge on its merits, I have had no regard whatever to the consequences that would follow if it were allowed; embarrassing and injurious as they would undoubtedly be, I have excluded them, and confined my attention altogether to the inquiry whether it was supported by authority, precedent or principle of law. But I think it right and necessary to add, that the matter of this challenge, if it had any real existence, has lain dormant for centuries; that if it had the tendency now for the first time attributed to it, it must notoriously and vitally have tainted the most important branch of the administration of justice in this populous city, and that, therefore, the discovery of its pernicious nature and effects could scarcely have been reserved and delayed until the nineteenth century. It is this consideration that has impressed me with the omission in this challenge of any actual averment of user, possession, or enjoyment; of such user, possession, or enjoyment of this franchise under the charter of Henry V.—an omission, in my mind, not of form but of substance; for rights of this kind may be, as the authorities abundantly prove, lost or forfeited by non-user or misuser. Were it necessary to decide the case on the ground of this omission, which it is not, I should be strongly disposed to think it fatal to this challenge, and to conclude that the averment of user and possession was not made, because it could not have been made without tendering an issue on the fact. But it is enough to say, in conclusion, that on its merits this challenge, in my judgment, is utterly untenable. The last error assigned is, that for the felony of which John Martin has been convicted, he has been sentenced to be transported beyond the seas for a term of ten years. This, it is contended, is varying from the sentence

which the statute, introducing transportation as a punishment, prescribes, and which, it is said, requires some place not in Europe to be specified in the sentence pronounced by the judge. This argument assumes that the sentence of transportation is governed by the act of the 26 Geo. 3, c. 24, s. 66. We think that this is not so. The sentence itself is in the very terms of the act of the 11 Vict. c. 12, which creates the felony of which the prisoner has been found guilty; and, under the 30 Geo. 3, c. 32, the lord-lieutenant is to appoint the place to which the convict is to be transported in execution of his sentence: but, on this subject, there are various authorities. The case of *Gray v. The Queen* (in error) is one, and the case of *Roe v. The King* (in error) is another. But I have before me the decision of this court on the very point, in the case of *William Reynolds v. The Queen* (in error); and this court awarded the sentence of transportation, in the following words:—"It is considered by the court, that the said William Reynolds should be transported for the term of ten years;" not saying, "parts beyond the seas." One of the errors assigned and overruled by the court was, that the sentence of transportation awarded by the court was too wide, and bad, not being a sentence of transportation beyond the seas to any particular colony. The objection, therefore, is not only met by the very terms of the statute, in which terms the sentence was pronounced, but it has been long since raised and decided. For these reasons, it appears to me, and I believe to my learned brethren, that all these causes of error ought to be overruled.

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CRAMPTON, J.—I concur in the judgment just pronounced by my Lord Chief Justice, and for the reasons which have been stated in his clear and satisfactory judgment.

PERRIN, J.—I concur in the judgment pronounced by my Lord Chief Justice, and I wish merely to add this, that I think the challenge in this case, in addition to the grounds which have been already so precisely stated, is mainly defective in this respect—that it is not shown by it that the corporation, or any member of it, were entitled to any forfeiture, matter, or thing, by reason of the conviction of the person, John Martin.

MOORE, J.—I fully concur in the judgment, and in the reasons that have been given for it.

Ireland.

COURT OF QUEEN'S BENCH.

Michaelmas Term, 1848, and Hilary Term, 1849.

(Before the FULL COURT.)

November 21, 22, 23, and 24, 1848, and January 16, 1849.

WILLIAM SMITH O'BRIEN, in Error, v. THE QUEEN. (a)

THOMAS FRANCIS MEAGHER, in Error, v. THE QUEEN.

TERENCE BELLEW MACMANUS, in Error, v. THE QUEEN.

PATRICK O'DONOHUE, in Error, v. THE QUEEN.

Treason—Special commission—Caption, form of—Indictment—High treason—Stat. 25 Edw. 3, stat. 5, c. 2—Effect of Poyning's Act—Practice, as to delivery of copy of indictment, and list of witnesses and jurors—Plea of non-delivery—Challenge—Form of allocutus.

In the caption of an indictment for high treason, it was stated that the indictment was found "At a Special Session of Oyer and Terminer and General Gaol Delivery, holden in and for the County of Tipperary at Clonmel, on, &c., before the Right Honourable Francis Blackburne, Chief Justice of Her Majesty's Court of Chief Place in Ireland; the Right Honourable John Doherty, Chief Justice of Her Majesty's Court of Common Pleas in Ireland; and the Right Honourable Richard Moore, fourth Justice of Her Majesty's Court of Chief Place, in Ireland, Justices and Commissioners of our said Lady the Queen, of Oyer and Terminer, within her said County of Tipperary, nominated and appointed to inquire into, hear, and determine all, and all manner of treasons, &c., within the said County of Tipperary, and also nominated and appointed from time to time, as need should be, to deliver the gaols of our said Lady the Queen, of the said County of Tipperary, of all prisoners, &c., &c., being by virtue of a commission under letters patent of our said Lady the Queen, bearing date at Dublin, the first day of September, in the 12th year of the reign of our said Lady the Queen, to them the said Francis Blackburne, John Doherty, and Richard Moore, and others in the said letters named directed."

Held, on writ of error, that the caption sufficiently disclosed authority in the justices named to hold the sessions of themselves, though the commission was stated to have been directed to them and others.

Held, that to levy war against the Sovereign in Ireland is high treason in Ireland at common law, and also that the statute of 25 Edw. 3, stat. 5, c. 2, was extended to Ireland by Poyning's Act, 10 Hen. 7, c. 10. The prisoners, who were indicted in five counts for levying war against the Queen in Ireland, and in a sixth for compassing the death

(a) Reported by W. ST. LEONE BABINGTON, Esq., Barrister-at-Law.

of Her Majesty, on being arraigned, tendered pleas alleging that a copy of the indictment and list of the witnesses and jury panel, were not delivered to them ten days before the days of trial, and that they ought not now to be called on to plead, because of such non-delivery, concluding with a verification, and praying judgment that they might not now be compelled to answer the said indictment.

fact, copies of the indictments were furnished five days before, but the lists were not delivered at all. These pleas, having been demurred to by the Attorney-General, were overruled by the court below.

eld, that they were rightly overruled, and that the prisoners were not entitled to a copy of the indictment more than five days before the trial, or to a list of the witnesses or jury panel at any period.

eld, that the 1st and 4th sections of the statute 57 Geo. 3, c. 6, are not extended to Ireland, and therefore that persons prosecuted in Ireland are not entitled to the benefits conferred by the statutes 7 & 8 Will. 3, and 7 Anne, c. 21, on persons accused of high treason.

eld, that in high treason a prisoner is not entitled to challenge more than twenty jurors peremptorily.

he record in each case averred that the prisoner was asked whether he now hath "anything to say for himself wherefore the said justices and commissioners ought not, upon the premises and verdict aforesaid, to proceed to judgment against him," without saying "judgment of death," or "judgment and execution."

eld, that this was a sufficient demand notwithstanding.

THE plaintiffs in error, William Smith O'Brien, Thomas Francis Meagher, Terence Bellew MacManus, and Patrick Donohue, having been severally tried at a Special Sessions of Oyer and Terminer and General Gaol Delivery for the county of Tipperary, holden at Clonmel, in the month of October, 1848, before the Lord Chief Justice, the Lord Chief Justice of the Common Pleas, and Mr. Justice Moore, upon separate indictments for high treason, and found guilty and sentenced accordingly to death and execution, they sued out separate writs of error in each case to reverse the judgment of the court below. The record and assignment of errors, which were, except as hereinafter mentioned, similar in each case, were as follows:—

County of Tipperary, } Be it remembered, that at a Special Ses-
to wit. } sions of Oyer and Terminer and General
Gaol Delivery, holden in and for the county of Tipperary, on
Thursday, the 21st day of September, in the twelfth year of the
reign of our Sovereign Lady Queen Victoria, by the grace of God,
the United Kingdom of Great Britain and Ireland, Queen,
 Defender of the Faith, and so forth, and in the year of our Lord
1848, before the Right Honourable Francis Blackburne, Chief
Justice of Her Majesty's Court of Chief Place in Ireland; the
Right Honourable John Doherty, Chief Justice of Her Majesty's
Court of Common Pleas in Ireland; and the Right Honourable
Richard Moore, Fourth Justice of Her Majesty's Court of Chief
Place in Ireland, Justices and Commissioners of our said lady the
Queen, of Oyer and Terminer, within her said county of Tip-
perary, nominated and appointed to inquire into, hear and deter-

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mine all, and all manner of treasons, murders, manslaughters, burnings, felonies, robberies, crimes, contempts, offences, transgressions, evil-doings, and matters and things whatsoever, by whomsoever done, committed, or perpetrated within the said county of Tipperary, as well against the peace and the common law of Ireland as against the form and effect of any statute or statutes, acts, ordinances, or provisions, theretofore made, ordained or confirmed, and also nominated and appointed from time to time as need should be to deliver the gaols of our said lady the Queen, of the said county of Tipperary, of all prisoners and malefactors therein, saving to our said lady the Queen all amerciaments thence arising and accruing, being by virtue of a commission under letters patent of our said lady the Queen, under the Great Seal of that part of the United Kingdom of Great Britain and Ireland, called Ireland, bearing date at Dublin, the 1st day of September, in the twelfth year of the reign of our said lady the Queen, to them the said Francis Blackburne, John Doherty, and Richard Moore, and others in the said letters named, directed, by the oaths of Richard John Hely Hutcheson, commonly called Lord Viscount Suidale, the Honourable Cornelius O'Callaghan, the Honourable Francis Aldborough Prittie, the Honourable Richard Hely Hutcheson, Sir Edmond Wallis, Bart., William Ponsonby Barker, Esq., Stephen Moore, Esq., John Bagwell, Esq., Ambrose Going, Esq., Mathew Pennefather, Esq., Way Palliser, Esq., John Bayley, Esq., Thomas Barker Barton, Esq., John Trant, Esq., John Carden, Esq., William Quinn, Esq., James Butler, Esq., Stephen O'Meagher, Esq., Henry Trench, Esq., Caleb Going, Esq., Thomas Lalor, Esq., James Lanigan, Esq., Joseph Cooke, Esq., good and lawful men of the body of the said county, then and there empannelled, sworn, and charged to inquire for our said lady the Queen, and for the body of the said county of Tipperary. It is presented in manner and form following, that is to say:—

First Count.

County of Tipperary, to wit.—The jurors for our lady the Queen, upon their oath, do say and present that William Smith O'Brien, late of Cahermoyle, in the county of Limerick, Esq.; Terence Bellew MacManus, late of Liverpool, in that part of the United Kingdom called England, gentleman; James Orchard, late of Killenaule, in the county of Tipperary, labourer; Denis Tyne, late of Crohill, in the said county of Tipperary, labourer; and Patrick O'Donnell, late of Ballingarry, in the said county of Tipperary, yeoman, being subjects of our said lady the Queen, not having the fear of God in their hearts, nor weighing the duty of their allegiance, but being moved and seduced by the instigation of the devil, as false traitors against our said lady the Queen, and wholly withdrawing the love, obedience, fidelity, and allegiance, which every true and lawful subject of our said lady the Queen should, and of right ought, to bear towards our said lady the Queen, on the 17th day of July, in the twelfth year of the reign of our sovereign lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the

Faith, and so forth, and on divers other days between that day and the 30th day of the same month of July, with force and arms at the parish of Ballingarry, in the said county of Tipperary, together with a great multitude of false traitors whose names are to the aid jurors unknown, to the number of 500 and more, arrayed and armed in a warlike manner, that is to say, with guns, pistols, pikes, clubs, bludgeons, and other weapons, being then and there unlawfully, maliciously, and traitorously assembled and gathered together against our said lady the Queen, did then and there wickedly, maliciously, and traitorously levy and make war against our said lady the Queen, within this realm, and being so assembled together, arrayed and armed against our said lady the Queen as aforesaid, did then and there, with great force and violence, parade and march in a hostile manner in and through divers villages, towns, places, and public highways, to wit, in the said parish of Ballingarry, in the county of Tipperary aforesaid, and did then there erect certain obstructions composed of cars, carts, pieces of timber and other materials erected and built to a great height, that is to say, to the height of five feet and upwards, upon and across the said highways, to obstruct and prevent the marching of soldiers of our said lady the Queen, within this realm, and did then and there make a warlike attack upon, and fire at, a large number of constables, then and there lawfully being upon their duty as constables, and did then and there, with force and violence, endeavour to compel the said constables to join them in levying and raising public insurrection, rebellion, and war, against our said lady the Queen, within this realm, and did then and there make a warlike attack upon a certain dwelling-house, situate at Ballynora, in the said parish of Ballingarry, in the county of Tipperary aforesaid, and did then and there fire upon a large number of constables, that is to say, forty constables therein assembled, and did then and there maliciously and traitorously attempt and endeavour by force and arms to subvert and destroy the government and constitution of this realm as by law established, to the contempt of our said lady the Queen and her laws, to the evil example of all others, contrary to the duty and allegiance of them said W. S. O'B., T. B. MacM., J. O., D. T., P. O'D., against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further find and present that the said W. S. O'B., T. B. MacM., J. O., D. T., and P. O'D., being subjects of our said lady the Queen, not having the fear of God in their hearts, nor weighing the duty of their allegiance, but being moved and seduced by the instigation of the devil, as false traitors against our said lady the Queen, and wholly withdrawing the love, obedience, fidelity, and allegiance, which every true and lawful subject of our said lady the Queen should, and of right ought, to bear towards our said lady the Queen, on the 26th day of July, in the twelfth year of the reign aforesaid, with force and arms, at Mullinahone, in the parish of Kil-

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W.S.O'BRIEN, vemron, in the said county of Tipperary, together with a great
 AND OTHERS, multitude of false traitors whose names are to the said jurors
 IN ERROR, unknown, to the number of 100 and more, arrayed and armed in
 v. a warlike manner, that is to say, with guns, pistols, pikes, clubs,
 THE QUEEN. bludgeons, and other weapons, being then and there unlawfully,
 High treason. maliciously, and traitorously assembled and gathered together
 against our said lady the Queen, did then and there wickedly,
 maliciously, and traitorously further levy and make war against
 our said lady the Queen, within this realm, and being so arrayed
 and armed against our said lady the Queen as aforesaid, did then
 march in a warlike manner in and through divers villages, towns,
 places, and highways, to wit, at the parish aforesaid, in the county
 aforesaid, and did then and there maliciously and traitorously, with
 great force and violence, march to a certain dwelling-house in
 Mullinahone, in the said county, in which a large body of constables
 then were lawfully assembled as such constables, and did then and
 there endeavour, by force and violence to compel the said constables
 to surrender their arms and join with them in so levying and
 making war against our said lady the Queen within this realm, and
 did then and there maliciously and traitorously attempt and
 endeavour, by force and violence, to subvert and destroy the
 government and constitution of this realm as by law established,
 in contempt of our said lady the Queen and her laws, to the evil
 example of all others, contrary to the duty of the allegiance of
 them the said W. S. O'B., T. B. MacM., J. O., D. T., and P. O'D.,
 against the form of the statute in such case made and provided,
 and against the peace of our said lady the Queen, her crown and
 dignity.

Third Count.

And the jurors aforesaid, upon their oath aforesaid, do further
 present that the said W. S. O'B., T. B. MacM., J. O., D. T.,
 and P. O'D., being subjects of our said lady the Queen, not hav-
 ing the fear of God in their hearts, nor weighing the duty of their
 allegiance, but being moved and seduced by the instigation of the
 devil, as false traitors against our said lady the Queen, and wholly
 withdrawing the love, obedience, fidelity, and allegiance, which
 every true and lawful subject of our said lady the Queen should,
 and of right ought, to bear towards our said lady the Queen, on
 the 28th day of July, in the twelfth year of the reign aforesaid,
 with force and arms at Killenaule, in the parish of Killenaule, in
 the county of Tipperary aforesaid, with a great multitude of false
 traitors, whose names are to the said jurors unknown, to the
 number of 100 and more, arrayed and armed in a hostile manner,
 that is to say, with guns, pistols, pikes, clubs, bludgeons, and other
 weapons, being then and there unlawfully, maliciously, and traitor-
 ously assembled and gathered together against our said lady the
 Queen, did then and there wickedly, maliciously, and traitorously
 further levy and make war against our said lady the Queen as
 aforesaid, did then and there unlawfully, maliciously and traitor-
 ously erect and build certain obstructions composed of cars, carts,
 pieces of timber, and other materials, erected and built to a great

height, that is to say, to the height of five feet and upwards, upon and across the highway leading through the said town of Killenaule, whereby then and there unlawfully, maliciously, and traitorously to obstruct and hinder the marching of the soldiers of our said sovereign lady the Queen through Killenaule, upon and along the said highway, and did then and there maliciously and traitorously attempt and endeavour by force and violence to subvert and destroy the government and constitution of this realm, as by law established, in contempt of our said lady the Queen and her laws, to the evil example of all others, contrary to the duty of the allegiance of them the said W. S. O'B., T. B. MacM., J. O., D. T., and P. O'D., against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

W. . O'BRIEN
AND OTHERS,
IN ERROR,
v.
THE QUEEN.
—
High treason.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. S. O'B., T. B. MacM., J. O., D. T., and P. O'D., being subjects of our said lady the Queen, not having the fear of God in their hearts, nor weighing the duty of their allegiance, but being moved and seduced by the instigation of the devil, as false traitors against our said lady the Queen, and wholly withdrawing the love, obedience, fidelity, and allegiance which every true and lawful subject of our said lady the Queen should, and of right ought to, bear towards our said lady the Queen, on the 29th day of July, in the twelfth year of the reign aforesaid, with force and arms, at Farrinrory, in the parish of Ballingarry, in the said county of Tipperary, together with a great multitude of false traitors whose names are to the said jurors unknown, to the number of 500 and more, arrayed and armed in a warlike manner, that is to say, with guns, pistols, pikes, clubs, bludgeons and other weapons, being then and there unlawfully, maliciously and traitorously assembled and gathered together against our said lady the Queen, did then and there wickedly, maliciously and traitorously, further levy and make war against our said lady the Queen within this realm, and being so arrayed and armed against our said lady the Queen as aforesaid, did then and there, in a warlike manner, make an attack upon, and fire at, a large body of constables then and there lawfully being in discharge of their duties as such constables, and did then and there make a warlike attack upon a certain dwelling-house at Farrinrory aforesaid, in which a large body of constables, that is to say, forty constables, were then lawfully assembled on their duty as such constables, and did then and there fire upon the constables there assembled, and did then and there maliciously and traitorously attempt and endeavour by force and violence to subvert and destroy the government and constitution of this realm as by law established, in contempt of our said lady the Queen and her laws, to the evil example of all others, contrary to the duty of the allegiance of them the said W. S. O'B., T. B. MacM., J. O., D. T., and P. O'D., against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

Fourth Count.

W.S. O'BRIEN,
AND OTHERS,
IN ERROR,
v.
THE QUEEN.

High treason.

Fifth Count.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. S. O'B., T. B. MacM., J. O., D. T., and P. O'D., being subjects of our said lady the Queen, not having the fear of God in their hearts, nor weighing the duty of their allegiance, but being moved and seduced by the instigation of the devil, as false traitors against our said lady the Queen, and wholly withdrawing the love, obedience, fidelity, and allegiance which every true and lawful subject of our said lady the Queen should, and of right ought, to bear towards our said lady the Queen, on the 29th day of July, in the twelfth year of the reign aforesaid, with force and arms, at the parish of Ballingarry, in the said county of Tipperary, together with a great number of false traitors, whose names are to the said jurors unknown, to the number of 500 and more, arrayed and armed in a warlike manner, that is to say, with guns, pistols, pikes, clubs, bludgeons, and other weapons, being then and there unlawfully, maliciously, and traitorously assembled and gathered together against our said lady the Queen, did then and there wickedly, maliciously, and traitorously further levy and make war against our said lady the Queen within this realm, and did then and there maliciously and traitorously attempt and endeavour by force and arms to subvert and destroy the constitution and government of this realm as by law established, and deprive and depose our said lady the Queen of and from the style, honour, and kingly name of the imperial crown of this realm, in contempt of our said lady the Queen and her laws, to the evil example of all others, contrary to the duty of the allegiance of them the said W. S. O'B., T. B. MacM., J. O., D. T., and P. O'D., against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

Sixth Count.

And the jurors aforesaid, upon their oath aforesaid, do further say and present that the said W. S. O'B., T. B. MacM., J. O., D. T., and P. O'D., being subjects of our said lady the Queen, not having the fear of God in their hearts, nor weighing the duty of their allegiance, but being moved and seduced by the instigation of the devil, as false traitors against our said lady the Queen, and wholly withdrawing the love, obedience, fidelity, and allegiance which every true and faithful subject of our said lady the Queen should, and of right ought, to bear towards our said lady the Queen, on the 17th day of July, in the twelfth year of the reign aforesaid, and on divers other days between that day and the 30th day of the same month of July, with force and arms, at the said parish of Ballingarry, in the said county of Tipperary, maliciously and traitorously amongst themselves, and together with divers other false traitors, whose names are to the said jurors unknown, did compass, imagine, and intend to move and excite insurrection, rebellion and war against our said lady the Queen within this realm, and to subvert and alter the Legislature, rule, and government now duly and happily established within this realm, and to bring and put our said lady the Queen to death; and the

said compassing, imagination, invention, device, and intention, did then and there express, utter, and declare by divers overt acts and deeds hereinafter mentioned, that is to say, in order to fulfil, perfect and bring to effect their most wicked treason and treasonable compassing, imagination, invention, device and intention aforesaid, they the said W. S. O'B., T. B. Mac M., J. O., D. T., and P. O'D., as such false traitors as aforesaid, on the said 17th day of July, in the twelfth year of the reign aforesaid, and on divers other days between that day and the 30th day of the same month of July, with force and arms, at the said parish of Ballingarry, in the said county of Tipperary, maliciously and traitorously did assemble, meet, consult, and conspire amongst themselves, and together with divers other false traitors, whose names are to the said jurors unknown, to devise, arrange, and mature plans and means to stir up, raise, make and levy insurrection and war against our said lady the Queen within this realm, and to subvert and destroy the constitution and government of this realm as by law established, and to bring and put our said lady the Queen to death: And further, in order to fulfil, perfect, and bring to effect their most wicked treason and treasonable compassing, imagination, invention, device and intention aforesaid, they the said W. S. O'B., T. B. Mac M., J. O., D. T., and P. O'D., as such false traitors as aforesaid, on the said 17th day of July, in the twelfth year of the reign aforesaid, and on divers other days between that day and the said 30th day of the same month of July, with force and arms, at the said parish of Ballingarry, in the said county of Tipperary, maliciously and traitorously did arm themselves with, and bear and carry, certain weapons, that is to say, guns, pistols and pikes, with intent to associate themselves with divers other false traitors armed with guns, pistols and pikes, whose names are to the said jurors unknown, for the purpose of raising, levying, and making public insurrection, rebellion and war against our said lady the Queen, and of committing and perpetrating a cruel slaughter of and amongst the faithful subjects of our said lady the Queen, within this realm, and to bring and put our said lady the Queen to death: And further, in order to fulfil, perfect and bring to effect their most wicked treason and treasonable compassing, imagination, invention, device and intention aforesaid, they the said W. S. O'B., T. B. Mac M., J. O., D. T., and P. O'D., as such false traitors as aforesaid, on the said 17th day of July, in the twelfth year of the reign aforesaid, and on divers other days between that day and the said 30th day of the same month of July, with force and arms, at the said parish of Ballingarry, in the said county of Tipperary, with a great multitude of persons whose names are to the said jurors unknown, to a great number, to wit, to the number of 500 persons and upwards, armed and arrayed in a warlike manner, to wit, with guns, pistols and pikes, being then and there unlawfully and traitorously assembled and gathered together against our said lady the Queen, wickedly, maliciously and traitorously did then and there ordain, prepare, levy, and make public war

W. S. O'BRIEN,
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THE QUEEN.
High treason.

First overt act.

Second overt act.

Third overt act.

W. S. O'BRIEN,
AND OTHERS,
IN ERROR,
v.
THE QUEEN.

High treason.

Fourth overt
act.

Fifth overt act.

Sixth overt act.

against our said lady the Queen, within this realm: And further, in order to fulfil, perfect, and bring to effect their most wicked treason and treasonable compassing, imagination, invention, device and intention aforesaid, they the said W. S. O'B., T. B. Mac M., J. O., D. T., and P. O'D., as such false traitors as aforesaid, on the said 17th day of July, in the twelfth year of the reign aforesaid, and on divers other days between that day and the said 30th day of the same month of July, with force and arms, at the said parish of Ballingarry, in the county of Tipperary, maliciously and traitorously did construct and erect obstructions, consisting of carts, cars, logs of timber, and other materials upon and across the public highway, in order then and there to obstruct the marching of the soldiers of our said lady the Queen, and in order then and there to prevent the arrest of the said W. S. O'B., while the said W. S. O'B. then and there was maliciously and traitorously acting as the leader in raising, making and levying public insurrection, rebellion and war against our said lady the Queen, within this realm: And further, in order to fulfil, perfect and bring to effect their most wicked treason, and treasonable compassing, imagination, invention, device and intention aforesaid, they the said W. S. O'B., T. B. Mac M., J. O., D. T., and P. O'D., as such false traitors as aforesaid, on the said 17th day of July, in the twelfth year of the reign aforesaid, and on divers other days between that day and the 30th day of the same month of July, with force and arms, at the said parish of Ballingarry, in the said county of Tipperary, together with a great multitude of false traitors whose names are to the said jurors unknown, to the number of 500 and upwards then and there arrayed and armed in a warlike manner, that is to say, with guns, pistols, pikes, clubs and other weapons, being then and there unlawfully, maliciously and traitorously assembled and gathered together against our said lady the Queen, did then and there wickedly, maliciously and traitorously levy and make war against our said lady the Queen, within this realm, and being so arrayed and armed against our said lady the Queen as aforesaid, did then and there make a warlike attack upon a certain dwelling-house and fire upon certain constables and other the liege subjects of our said lady the Queen therein assembled: And further, in order to fulfil, perfect and bring to effect their most wicked treason and treasonable compassing, imagination, invention, device, and intention aforesaid, they the said W. S. O'B., T. B. Mac M., J. O., D. T., and P. O'D., as such false traitors as aforesaid, on the 17th day of July, in the twelfth year of the reign aforesaid, and on divers other days between that day and the said 30th day of the same month of July, with force and arms, at the said parish of Ballingarry, in the said county of Tipperary, maliciously and traitorously did assemble a great multitude of persons, whose names are to the said jurors unknown, to a great number, to wit, to the number of 500 persons and upwards, armed and arrayed in a warlike manner, to wit, with guns, pistols and pikes, and did then and there proceed to a certain dwelling-house, situate at Mullinahone, in the county of Tippe-

rary aforesaid, in which said dwelling-house divers, to wit, twenty, constables then were, and did then and there with force and violence maliciously and traitorously demand that the said constables should deliver up their arms to them, and did then and there maliciously and traitorously solicit the said constables to join with them in raising, making, and levying public insurrection, rebellion, and war against our said lady the Queen within this realm: And further, in order to fulfil, perfect and bring to effect their most wicked treason, and treasonable compassing, imagination, invention, device and intention aforesaid, they the said W. S. O'B., T. B. Mac M., J. O., D. T., and P. O'D., as such false traitors as aforesaid, on the said 17th day of July, in the twelfth year of the reign aforesaid, and on divers other days between that day and the said 30th day of the same month of July, with force and arms, at the said parish of Ballingarry, in the said county of Tipperary, maliciously and traitorously did assemble and gather together a great multitude of persons, whose names are to the said jurors unknown, to a great number, to wit, to the number of 500 persons and upwards, and then and there maliciously and traitorously drill, marshal and array them in military order and procession, and practise them in military movements, in order to fight with and kill the soldiers and other liege subjects of our said lady the Queen, and in order to raise, levy and make public rebellion, insurrection and war against our said lady the Queen within this realm, in contempt of our said lady the Queen and her laws, to the evil example of all others, contrary to the duty of the allegiance of them the said W. S. O'B., T. B. Mac M., J. O., D. T., and P. O'D., against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

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THE QUEEN.
High treason.

*Seventh overt
act.*

And thereupon, then and there, on the said Thursday, the 21st day of the said month of September, in the 12th year of the reign aforesaid, the delivery of the gaols of our said lady the Queen, for the said county of Tipperary, and all and singular the further and other proceedings of the said Special Sessions of Oyer and Terminer and General Gaol Delivery are adjourned by the said justices and commissioners until the morrow, to wit, Friday, the 22nd day of September, in the 12th year of the reign aforesaid, to be had at the tenth hour before mid-day of the said day, at Clonmel aforesaid, before the justices and commissioners aforesaid, to do further as the court there should consider and so forth; and upon the said Friday, the 22nd day of the said month of September, in the 12th year of the reign aforesaid, the said delivery of the gaols for the said county of Tipperary, and the further and other proceedings of the said Special Sessions of Oyer and Terminer and Gaol Delivery are held by the said adjournment for the said county, at Clonmel aforesaid, before the said justices and commissioners of our said lady the Queen. [The record then stated the several further adjournments of the court until the day of arraignment.]

Continuances.

W.S.O'BRIEN,
AND OTHERS,
IN ERROR,
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THE QUEEN.

High treason.

Prisoner is
brought to the
bar.

Appearance.

Plea of abate-
ment.

Demurrer to
plea of abate-
ment.

And thereupon, then and there, on the said Monday, the 28th day of the said month of September, in the 12th year of the reign of our said lady the Queen, at the said delivery of the said gaols aforesaid, and at the said Sessions of Oyer and Terminer and Gaol Delivery held by the said adjournment for the said county, at Clonmel, before the said justices and commissioners of our sovereign lady the Queen, comes the said W. S. O'Brien, in his proper person, in the custody of R. Pennefather, Esq., High Sheriff of the county of Tipperary, to whose custody the aforesaid W. S. O'Brien, for the cause aforesaid, was before that time committed, and the said W. S. O'Brien being brought to the bar of the court here, in his proper person and he the said W. S. O'Brien having heard the indictment aforesaid read, and forthwith concerning the treasons in the indictment aforesaid above specified and charged, upon being asked how he the said W. S. O'Brien would acquit himself thereof, he the said W. S. O'Brien says that he ought not to be compelled now to answer the same, because he saith that by the indictment aforesaid he the said W. S. O'Brien is charged and indicted for, amongst other things, compassing, imagining and intending to put our lady the Queen to death, and that by the statutable enactments in that case made and provided, and now in force in this realm, every person indicted for compassing, imagining and intending death or destruction to our lady the Queen, is entitled to have delivered to him, ten days before his trial, and in presence of two or more credible witnesses, a copy of the indictment, and at the same time a list of the witnesses to be produced on the trial for proving the said indictment, mentioning the names, professions, and places of abode of the said witnesses, and the said W. S. O'Brien says that the indictment aforesaid was found a true bill of the jurors aforesaid on Thursday, the 21st day of September instant, and that on the said Thursday, the 21st of September instant, a copy of the said indictment was delivered to him the said W. S. O'Brien in open court, but that no list of the witnesses, or of any witnesses or witness, to be produced on the trial for proving the said indictment was then, or at any time since, delivered to him the said W. S. O'Brien, and the said W. S. O'Brien says that ten days have not elapsed since the delivery to him the said W. S. O'Brien of the indictment aforesaid [in Macmanus's case the plea referred in terms to the statute of 7th Anne, and also named the non-delivery of a list of the jurors], and this he the said W. S. O'Brien is ready to verify, wherefore he prays judgment, and that he may not be compelled now to answer the said indictment, and so forth.

And thereupon the Right Honourable James Henry Monahan, Attorney-General for our said lady the Queen, who for our said lady the Queen prosecutes in this behalf, to the said plea of the said W. S. O'Brien by him above pleaded saith, that the same and the matters therein contained in manner and form as the same are

above pleaded and set forth are not sufficient in law to prevent the said W. S. O'B. from being now compelled to answer the said indictment, and this he said James Henry Monahan, who prosecutes as aforesaid, is ready to verify. Wherefore for want of a sufficient plea in this behalf he the said James Henry Monahan for our said lady the Queen prays judgment, and that the said W. S. O'B. may be compelled now to answer the said indictment; and the said W. S. O'B. saith that his said plea by him above pleaded, and the matters therein contained in manner and form as the same are above pleaded and set forth are sufficient in law to prevent the said W. S. O'B. from being compelled now to answer the said indictment, and the said W. S. O'B. is ready to verify and prove the same as the said court here shall direct. Wherefore inasmuch as the said James Henry Monahan, for our said lady the Queen, hath not answered the said plea, nor hitherto in any manner denied the same, the said W. S. O'B. prays judgment, and that he may not be compelled now to answer the said indictment. Whereupon all and singular the premises being seen and by the court here fully understood, it is ordered, considered, and adjudged by the court, that the said plea above pleaded by the said W. S. O'B. in manner and form aforesaid, and the matters therein contained, are not sufficient in law to prevent the said W. S. O'B. from being compelled now to answer the said indictment, and that the said W. S. O'B. do now answer the said indictment. And the said W. S. O'B. being then and there again asked how he the said W. S. O'B. would acquit himself, thereof saith he is not guilty of the treasons in the indictment aforesaid above specified and charged, or any of them, and thereof for good and ill he puts him on the country, and so forth. And the said James Henry Monahan, Attorney-General of our said lady the Queen, who for our said lady the Queen in this behalf prosecutes, doth the like, and so forth. Whereupon the said sheriff of the county of Tipperary is by the court here commanded that he cause immediately to come before the justices and commissioners aforesaid at the said sessions of Oyer and Terminer aforesaid, at Clonmel aforesaid, a jury of honest and lawful men of the body of the said county and so forth, by whom the truth of the matter may be better known, and who are of no affinity to the said W. S. O'B., to recognize upon their oath whether the said W. S. O'B. be guilty of the treasons in the said indictment above charged and specified, or any of them, or not guilty, and so forth. Because as well the said W. S. O'B. as the said James Henry Monahan, Attorney-General of our said lady the Queen, who for our said lady the Queen in this behalf prosecutes, have put themselves thereof upon that jury: and the jurors of that jury by the said sheriff of the said county for this purpose empannelled, and here returned, being called, thereupon come.—(The record in Mr. O'Brien's case stated a challenge to the array, on the ground that there was not, at the time of arraying the panel, a juror's book for the county of Tipperary for the current year (1848) in existence, contrary to the

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THE QUEEN.
High treason.

Joinder.

*Judgment of
respondent
ouster.*

*Plea of not
guilty.*

*Award of
venire.*

*Challenge to
the array.*

W. S. O'BRIEN, *statutable enactments in that behalf, and that, notwithstanding the*
 AND OTHERS, *sheriff had not returned the panel from the juror's book for the*
 IN ERROR, *preceding year, and that the sheriff had arrayed and returned the*
 v. *panel partially and unindifferently, with a view and intention to*
 THE QUEEN. *injure and prejudice the said W. S. O'B. in his trial in this case,*
High treason. *and then stated a plea by the Attorney-General negating the*
material allegations of the challenge, the joinder of issue, appoint-
ment of triers, and their finding against the challenge, and its
 Peremptory *disallowance by the court. The record then averred the swearing*
 challenge. *of ten jurors, the peremptory challenge by W. S. O'B. of twenty*
jurors, and afterwards the peremptory challenge of Southcote
Mansergh, another juror, the disallowance of the twenty-first
peremptory challenge, and the swearing of the remainder of the
 Verdict. *jury, and then proceeded as follows:—*
And the jurors of the said jury so empannelled as aforesaid,
being duly elected, returned and sworn to speak the truth of and
concerning the premises in the indictment aforesaid above speci-
fied and charged, do say, upon their oath aforesaid, that he the
said W. S. O'B. is guilty of the treason in the said first count
of the indictment aforesaid above specified and charged and alleged
against him the said W. S. O'B. in the said first count thereof.
(The record then stating in like manner a finding of guilty on the
second, third, fourth and fifth counts, proceeded as follows:—
 Allocutus. *And the jurors aforesaid do further say, upon their oath aforesaid,*
that the said W. S. O'B. is not guilty of the treason in the
said sixth count of the indictment above specified and charged,
in manner and form as the same is charged and alleged against
him the said W. S. O'B., in the said sixth count thereof, upon
which it is demanded of him the said W. S. O'B., whether
he now hath anything to say for himself, wherefore the said
justices and commissioners ought not, upon the premises and
verdict aforesaid, to proceed to judgment against him the said
W. S. O'B. for the said treasons in the said first, second, third,
fourth and fifth counts of the said indictment above specified and
alleged, who nothing further says than he had before said. Where-
upon all and singular the premises being seen, and by the said
justices and commissioners here fully understood, it is con-
sidered and adjudged by the court here, that he the said W. S. O'B.
for the treasons in the said first count of the said indictment
above specified and charged be taken from the bar of the court,
 Judgment. *where he now stands, to the place from whence he came, the gaol,*
and that he be thence drawn on a hurdle to the place of execution,
and that he be there hanged by the neck until he be dead, and that
afterwards his head shall be severed from his body, and his body be
divided into four quarters, to be disposed of as Her Majesty shall
think fit. And it is further considered and adjudged, &c. [Setting
out a separate judgment of death and execution upon the second,
third, fourth and fifth counts.] And it is further considered by the
court here, that he the said W. S. O'B. for the said treason in the
said sixth count of the said indictment above specified and charged

go thereof without a day, and so forth.—Upon this record the following errors were assigned on the part of Mr. O'Brien—the errors assigned in the other cases being substantially the same:—

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THE QUEEN.

High treason.

And now, that is to say on Friday, the 17th day of November, in this same term, comes the said William Smith O'Brien into the court of our lady the Queen, before the Queen herself, in his proper person, in the custody of Richard Pennefather, Esq., high sheriff of the said county of Tipperary, by virtue of a writ of *habeas corpus* duly issued in that behalf, and immediately says that in the record and proceedings aforesaid, and also in the giving of the judgments aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that judgment was given upon the record aforesaid for our said lady the Queen, whereas by the law of this realm judgment ought to have been given thereupon for the said W. S. O'B., and against our said lady the Queen; and therefore in that there is a manifest error.

Assignment of errors.

There is error also in this, to wit, that it does not appear by the record aforesaid that the parties aforesaid by whom said indictment was taken, and before whom the same was tried, were duly authorized in that behalf to take or try the same; and therefore in that there is manifest error. There is error also in this, to wit, that by the record aforesaid it appears that the letters patent in said record mentioned, appointing and nominating justices and commissioners of Oyer and Terminer and Gaol Delivery for the said county of Tipperary, were directed to the justices by whom said indictment was taken, and others in said letters patent named; but it does not appear in or by said record, that any power or jurisdiction was given to any number of the justices and commissioners to whom the said letters patent were directed less than the whole number of said justices and commissioners to take indictments, or to hear and determine the offences in said indictment charged; and yet, by the record aforesaid, it appears that said indictment was taken by and tried before three only of the justices and commissioners to whom the said letters patent were directed; and therefore in that there is manifest error. There is also in this, to wit, that it does not appear by the record aforesaid, that the justices aforesaid, by whom the said indictment was taken, were duly, or at all, in manner by law required, assigned and determine offences within the said county of Tipperary, to deliver the gaols of said county, and therefore in that there is manifest error. There is error also in this, to wit, that it does not appear by the record aforesaid, that the said indictment was taken by the jurors aforesaid a true bill by and upon the oaths and testimony of two lawful witnesses, pursuant to the statutable provisions in such case made and provided; and therefore in that there is manifest error. There is error also in this, to wit, that by the record aforesaid it appears that judgment was given for our said lady the Queen against the said W. S. O'B. upon each and every of the first five counts of the said indictment, whereas by the laws of this realm judgment should have been given for the

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High treason.

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said W. S. O'B. upon each of said five counts, each of said first five counts being insufficient in law to warrant judgment thereon for our said lady the Queen against the said W. S. O'B.; and therefore in that there is manifest error. There is also error in this, to wit, that judgment was given for our said lady the Queen upon the demurrer put in by Her Majesty's Attorney-General to the plea pleaded by the said W. S. O'B. aforesaid, whereby the said W. S. O'B. prayed judgment whether he should be compelled thereon to answer the said indictment; whereas by the laws of this realm judgment should have been given upon said demurrer for the said W. S. O'B.; and therefore, in that there is manifest error. There is error also in this, that by the record aforesaid, it appears that a copy of the said indictment aforesaid was not delivered to him the said W. S. O'B., ten days before his trial upon said indictment, pursuant to the statutable enactments in that behalf made and provided; and therefore in that there is manifest error. There is error also in this, to wit, that by the record aforesaid, it appears that no list of the witnesses, or of any witness or witnesses to be produced on the trial for proving the said indictment, was delivered to him the said W. S. O'B. ten days before his trial upon the indictment aforesaid, pursuant to the statutable enactments in such case made and provided; and therefore in that there is manifest error. There is error also in this, to wit, that it does not appear by the record aforesaid, that any precept or writ for the return of the jurors who passed upon him the said W. S. O'B., was in that behalf issued to the sheriff of the said county of Tipperary; and therefore in that there is manifest error. There is error also in this, to wit, that it appears by the record aforesaid, that the *venire facias juratores* awarded to the sheriff of the said county of Tipperary by the justices aforesaid, was not a proper *venire facias juratores* in that behalf, and conformable to the statutable enactments in such case made and provided; and therefore in that there is manifest error. There is error also in this, to wit, that by the record aforesaid, it appears that the challenge of him the said W. S. O'B., to Southcote Mansergh, one of the jurors aforesaid, who passed upon him the said W. S. O'B., on the indictment aforesaid, was disallowed by the said justices and commissioners; whereas by the laws of this realm, said last mentioned challenge ought to have been allowed; and therefore in that there is manifest error. [The above passage was omitted in Mr. Mac Manus's case.] There is also error in this, to wit, that it does not appear by the record aforesaid, that the verdicts above given upon the said first four counts of the said indictment respectively, or any of them, were or was formed upon the oaths and testimony of two lawful witnesses; and therefore in that there is manifest error. There is error also in this, to wit, that it does not appear by the record aforesaid, that it was demanded of him the said W. S. O'Brien, in manner in like cases used and accustomed, and by law required, what he had to say why

execution should not be awarded against him; and therefore that there is manifest error. There is error also in this, to wit, that the process and proceedings aforesaid, in manner and form as the same are above set forth, are not sufficient in law to warrant the judgments aforesaid given against him the said W. S. O'Brien; and therefore in that there is manifest error; and the said W. S. O'Brien prays that, for the errors aforesaid, and divers other errors in the records and proceedings aforesaid, the judgment aforesaid may be reversed, annulled, and altogether holden for naught, and that he the said W. S. O'Brien may be restored to all things which he hath lost by the judgment aforesaid, and so forth.

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The points noted for argument in Mr. W. S. O'Brien's case [the points relied on in the other cases being, with the exception of the question of the validity of the challenges and the non-delivery of a list of the jurors, the same] were:—

1st. That the caption is insufficient, as it does not show that the justices before whom the Special Sessions of Oyer and Terminer and general Gaol Delivery for the county of Tipperary was held, had due authority in that behalf to hold said sessions, or to take or try the indictment on which the plaintiff in error was convicted. Points for argument.

2nd. That the five counts on which the plaintiff in error was convicted are insufficient in law to support the judgment thereon given, inasmuch as the offences charged therein are not treason in Ireland.

3rd. That if they be treason, yet the said several five counts are insufficient in law to support said judgment for not charging the offence in the words of the statutes—for not expressly assuming that the war therein respectively mentioned was levied in Ireland and for concluding against the form of the statute, in place of against the form of the statutes, &c.

4th. That the judgment on the demurrer to the declinatory plea, entered by the plaintiff in error, should have been given for him and not for the crown.

5th. That there was a mis-trial, inasmuch as it appears from the record that the plaintiff in error had not delivered to him a copy of the indictment and a list of the witnesses ten days before trial, pursuant to the statutable enactments in such case made provided.

6th. That the process under which the jury was returned who tried the case was insufficient and informal, as the writ of *venire* *pro juratores*, under which the jury was returned, appears to have been issued by virtue of a bare award, and not as it ought to have been, by virtue of a particular precept; and, moreover, said writ appears not to have been in the form directed by the 3 & 4 William 4, c. 91, s. 10.

7th. That the challenge to the juror, Southcote Mansergh, should have been allowed.

8th. That the "*allocutus*" before judgment, entered on the

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record, is informal and insufficient in law, inasmuch as it does not appear thereby that the plaintiff in error was asked why the court should not proceed to judgment AND EXECUTION against him upon the verdict therein mentioned.

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Francis A. Fitzgerald, for the plaintiff in error.—The first error to which I shall call your lordships' attention is, that these sessions appear to have been holden before justices not appearing by the caption with any certainty to have any jurisdiction therefor. The sessions named are called a Special Sessions of Oyer and Terminer and General Gaol Delivery, holden before the Right Honourable Francis Blackburne, Chief Justice of Her Majesty's Court of Chief Place, in Ireland; the Right Honourable John Doherty, Chief Justice of Her Majesty's Court of Common Pleas, in Ireland; and the Right Honourable Richard Moore, fourth Justice of Her Majesty's Court of Chief Place, in Ireland, Justices and Commissioners of Oyer and Terminer, and of our said lady the Queen, within the said county of Tipperary, nominated and appointed, &c., to inquire into, hear and determine all and all manner of treasons, murders, manslaughters, burnings, &c. &c., and also nominated and appointed from time to time, as need should be, to deliver the gaols of our said lady the Queen, of the said county of Tipperary, &c. &c., being by virtue of a commission under letters patent of our said lady the Queen to them the said Francis Blackburne, John Doherty, and Richard Moore, and others, in the said letters named, directed. There is nothing in the caption to show that the three had by themselves jurisdiction to hold the sessions (2 Hawk. P. C. c. 25, s. 119; Bacon's Abridg. tit. Indictment, I.): every caption of an indictment must show that it was taken before a court which has a proper jurisdiction; and especially on a recent authority, I admit that every reasonable intendment is to be made in favour of the caption, and that the court are entitled to intend that anything is true, which though omitted to be stated, can necessarily be inferred from what is mentioned; but it cannot go any further than that: (*Martin, in Error, v. The Queen*, 3 Cox's Crim. Cas. 318.) In 2 Hale P. C. 167; Bacon's Abr. tit. Indictment I., the same thing is laid down with the reasons of it. "It hath been adjudged that it is not necessary for the caption of an indictment taken at a general sessions of the peace, to style any of them of the *quorum*, because it sufficiently shows that some of them were such, by showing that the indictment was taken at a general sessions." What a general sessions is, is matter of law, and is a thing which the court will take judicial notice of (*R. v. Cellers*, 1 Sid. 367); there the first objection was that the caption was *ad generalem sessionem pacis* before such justices, without stating that one or more of them were of the *quorum*; but that objection was overruled by the court, who said, "The caption is good; it shall be intended that one or more of them were of the *quorum*" (Comyn's Dig. tit. Justice of Peace, b. 1; Lambert, 373.) In 2 Hawk. c. 25, s. 118, the same thing is laid down. The only intimation of the persons in this case before whom the sessions was to be holden,

is from its being stated in the caption to be a commission under the Great Seal, directed to three, with "others;" but where is there any from which the court can by necessary inference imply that it was to be holden before the three justices separately? *The Earl of Leicester v. Heydon* (Plowd. 334) was an action of trespass by the Earl of Leicester, to which the defendant pleaded his attainder. A commission of Oyer and Terminer was directed to divers persons, reciting that on such a day Sir R. D. (the Earl) was indicted of high treason before fifteen commissioners of Oyer and Terminer in such a county (whereas, in truth, the commission was directed to so many, but the indictment was taken before eight of them only): and granting to them, or any four of them, authority to receive the indictment taken before fifteen commissioners, and to proceed thereupon as special justices of Oyer and Terminer, &c., by force whereof they proceeded and gave judgment against the Earl of high treason upon his own confession. It was held, that the attainder was bad, being *coram non iudice*, and so utterly erroneous as to be bad even on plea. I apprehend, therefore, that it will be impossible to find any case where the defect can be supplied, except where the fact omitted is a matter of necessary inference from the matters stated in the caption; on these grounds, therefore, I hope your lordships will hold that this caption is bad. In 2 Hale's P. C. 166, what the particular requisites are is stated; the second requisite stated is, "that the court where the presentment is made, viz., *ad generalem sessionem pacis*, &c., or, *ad generalem gaolæ regis deliberationem*," &c. The fourth requisite stated is, "the justices' names; but it is not necessary to name all the justices by name, but the rest may be supplied by the words *et sociis suis*, &c.); but so many are fit to be named as are enabled by their commission to hold a session; and the return of the caption is supposed to agree with the title of their sessions. This is a sessions directed by the commission to be holden by three justices, with "others;" the authority is only given to the three, with others, to hold them. The second objection is, that the counts are bad in law, which charge a levying war in *this realm*; that treason was originally created by the stat. of 25 Edw. 3, st. 5, c. 2, which makes it treason "if a man do levy war against our lord the King in this realm," "and thereof be proveably attainted of open deed by people of their condition." This statute, as originally passed, did not extend to Ireland. In 1 Hale's P. C. 155, commenting on the statute, it is laid down that Ireland "is no part of the realm of England, nor *infra quatuor Maria*." Referring to *Howard's case*, temp. Edw. 1, the 35 Hen. 8, c. 2, was passed for treasons done out of the realm. The two propositions which I submit are, that Ireland is not the king's realm within the statute of Edward 3, and that it is not out of the realm within the statute 35 Hen. 8, c. 2, passed for regulating the trial of treasons done out of the realm. The statute, as originally passed, did not extend to Ireland nor bind Ireland; but

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by Poyning's Act, 10 Hen. 7, c. 10, it was extended to Ireland: the mistake and fallacy of the argument relied on by the crown, rests on the word "extended." The framers of Poyning's Act (10 Hen. 7, c. 10) said "That divers good and profitable statutes having been made within the realm of England, whereby the said realm had greatly prospered, and in all likelihood so would *this land* if the same statutes were used within it, wherefore it be ordered that all statutes made in the realm of England be deemed good and effectual in the law, and be accepted and used in this land of Ireland," &c. It cannot fail to strike any one the distinction made between the "realm of England" and "land of Ireland;" up to that time, the title of the king of England in respect to this country was "Lord of Ireland," and when the title of "King of Ireland" was given for the first time by the 33 Hen. 8, c. 1, then the words "realm of Ireland" were used for the first time. If the English Legislature had at the time power to bind Ireland I could understand it; the effect of extending the statute would be the same as an act of the United Parliament extending to Ireland an English statute not in force in this country; the effect would be to read the statute as if to all local descriptions the word "Ireland" was added. But if the English Parliament, not having power to bind Ireland, could not extend the act to Ireland, and the Irish Parliament had not power to extend an English act to this country, the only effect of Poyning's Act would be to enact a statute in Ireland in precisely the same words as the statute of Edw. 3. I suppose that what will be contended for on the part of the crown will be, that the intention of the Legislature was to enact in Ireland a statute substituting Ireland for England in the English statute; but I submit that the necessary meaning is, to enact in Ireland a statute in the very same words as the English act. If you adopt the principle of substitution what words are you to substitute? what would be the meaning of a statute with the words "in his realm?" Ireland was not his realm at the time: the English Parliament had passed an act carefully excluding places not in his realm. The words in Poyning's Act are "in all times and in all points according to the true tenor and effect of the same;" now is it the true tenor and effect of this statute that the words which meant England in this statute of Edw. 3, should mean Ireland? The statute which we are now dealing with is one which has created the highest crime known to the law. The words in the indictment are "this realm," but the words of the statute are "his realm." "This realm" means the United Kingdom of Great Britain and Ireland, and nothing else, and I cannot see how any other construction can be put upon them; if there be any other true construction of them, where is the law which makes the levying of war in this realm according to the construction contended for at the other side, treason? There is one statute making the levying war in this realm or land of Ireland (10 Hen. 7) treason; and another applicable to levying war in England; but none making levying war in the United Kingdom treason. In

1 Hale P. C. 147, it is said that, in *Lord Strafford's case*, it was insisted that, by the statute 10 Hen. 7, c. 10, in Ireland, called Poyning's law, all the statutes of England are at once enacted to be observed in Ireland; and therefore by the statute 25 Edw. 3, declaring treasons, and the statute 1 Hen. 4, c. 10, enacting that nothing shall be treason but what was statute, the treasons enacted in Ireland in the time of Hen. 6, and afterwards before 10 Hen. 7, were repealed, and consequently this statute of 18 Hen. 6, c. 3. But that seems not so, for the general introduction of the statutes of England, being an affirmative law, could not take away those particular statutes that were made in Ireland for the declaring of treason, such as this and that also of the same year for taking Comerike. A judgment, at that period, would not be entitled to much weight but that Lord Hale acquiesces in it. It is unnecessary to interpret Poyning's law as making the 25 Edw. 3 applicable to Ireland, for the 10 Hen. 7 is applicable to levying war in Ireland. In *Kinloch's case* (Fost. Cr. L. 16-23), decided upon a statute in which the words "this realm" occur frequently, a plea was put in to the jurisdiction of the court, on the ground that Scotland had its own courts, and the question arose whether the court had power to try cases of treason committed in England in other countries than those in which they were committed, or treasons committed in Scotland, in other courts than those of the country in which they were committed. In that case the court held, that treason committed in Scotland was triable in England; but it also held, that the words "this realm" meant the United Kingdom of Great Britain, and nothing else, and that the words were not confined to England. The next question is, it appears to me, by far the most important—that arising on the validity of the prisoner's plea; the question raised by that plea is, whether the prisoner was entitled to have a copy of the indictment and list of the witnesses delivered to him at the same time—ten days before the trial; the plea negatives such delivery, and, if we be right in saying that the plaintiff in error was entitled to this delivery, we submit that the demurrer of the Attorney-General, which admits the truth of that denial, ought to have been overruled. This provision, under the stat. 7 Will. 3, c. 3, and 7 Anne, c. 21, also applies to all persons indicted for treasons. The stat. of 57 Geo. 3, c. 6, entitles persons accused of the treasons made or declared by that act to the benefits of the provisions of those two statutes (7 & 8 Will. 3, c. 3, and 7 Anne, c. 21), with certain exceptions; amongst the treasons declared by that act is the compassing or imagining the death of the sovereign, to every person then accused of that offence; that statute of Geo. 3, gives the benefits, save to those within the exception—where the overt act is an actual attempt on the life of the sovereign; we say that the statute of 57 Geo. 3, as originally passed, extended to Ireland, and that being so, that it gave to every person indicted for compassing the death of the Queen, the benefit of the statutes of Will. 3, and of Anne; and if that be so, we were entitled to have received a

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copy of the indictment and list of the witnesses ten days before the trial. But we contend that even if the statute of 57 Geo. 3 be not of its own force operative in Ireland, that it is, by the statute 11 & 12 Vict. extended (as to that part of it which is left unrepealed) to Ireland. The compassing of the death of the sovereign is defined by the statute of 25 Edw. 3. It will not be necessary to enumerate all the acts which courts have construed to be compassing the death of a sovereign: (Fost. C. L. 195.) At the time when the statute 36 George 3 was passed, the statute of Edward constituted almost the whole of the law of treasons. That statute (36 Geo. 3) was, as to treason, both a declaratory and enacting statute. It was a temporary act, to be in force only during the life of the then sovereign, and during the next session of Parliament after his demise; it enacted, that "if any person either within the realm or without, compass, imagine, invent, devise, intend death or destruction, maim or wounding, imprisonment, or restraint of the person of the same, our sovereign lord the King, his heirs and successors;" that is the first class of treasons, all directed against the person of the sovereign. The next class of offences is the compassing "to deprive or depose him, or them, from the style, honour, or kingly name of the imperial crown of this realm, or of any other of the king's dominions or countries." The third class of offences is, "to levy war against the king, his heirs and successors, in order by force or constraint to compel him or them to change their measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe both houses or either house of Parliament," or "to move or stir any foreigner or stranger with force to invade this realm, or any other of the king's dominions or countries under the obeisance of the king, his heirs and successors; and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, being legally convicted thereof upon the oaths of two lawful and credible witnesses, &c., shall be deemed and adjudged a traitor," &c. Here, where you have the very words of the statute of Edw. 3, I apprehend it is impossible to contend that every single thing in the statute of Edw. 3 is not comprised in the statute of 36 Geo. 3. The object of the latter statute was to make several of those things which were overt acts substantive treasons (*Watson's case*, per Lord Ellenborough, 32 St. Tr. 579), and the same thing was laid down in *Thistlewood's case*, (33 St. Tr. 684.) By the 5th section of the statute of 36 Geo. 3, it is declared that every person accused of the crimes therein specified should be entitled to the benefits of the statutes of Will 3 and Anne; now unquestionably that statute did not extend to Ireland: it extended to England and Scotland only, and the words used to express England and Scotland are "this realm;" "the imperial crown of this realm." By the 1st section of the statute 7 Will 3, c. 3, the party accused is entitled to a copy of the whole indictment

five days before his trial, and to have two counsel; by the 2nd section he is not to be indicted or attainted except on the testimony of two witnesses to the same overt act; by the 7th section he is entitled to a copy of the jury panel two days before the trial; and by the 8th section evidence is not to be given of any overt act not expressly laid in the indictment. In 1 Hale P. C. 121, it is stated that it was held by the judges (Kelying, 19, 20, 21) that if one overt act is laid in the indictment, and the proof is of another overt act of the same or any other species of treason, it is sufficiently good evidence; but Hale dissents from that decision. Foster (Disc. of High Treason, pp. 244, 245), in commenting on this statute of Will. 3, seems to assume that the law unquestionably required two witnesses to the same treason before the statute of 7 Will. 3, c. 3. This statute provided further that no overt act not laid in the indictment should be given in evidence. The 7 Anne, c. 21, entitled the party accused to a list of the jurors, at the same time as a copy of the indictment, and that that copy should be given ten days before the trial; that then was the state of the law at the passing of the 36 Geo. 3, c. 7. The Law of Treasons continued in Ireland, as settled by the statute of Edw. 3. The 5 Geo. 3, c. 21, though it did not refer to the act of Will. 3, gave to parties indicted a copy of the indictment five days before trial, and gave him a right to two counsel; the other benefits conferred by the statutes, the giving a copy of the jury panel, and that no overt act which was not laid in the indictment should be given in evidence, were not conferred. The 39 Geo. 3, c. 93, enacted that in all cases of high treason, where the overt act alleged in the indictment is the assassination, or a direct attack upon the life or person of the sovereign, the trial shall be in the same manner as if the offender was tried for murder, and that none of the provisions of the statutes of William and Anne, touching trials for high treason, should extend to such cases, but that, nevertheless, judgment should be given and execution done, in the same way as in other cases of high treason. By the 57 Geo. 3, c. 6, s. 3, it is provided that the provisions of the act of 39 & 40 Geo. 3, c. 93, shall be extended to all cases of high treason in compassing the death of the Prince Regent, where the overt act alleged shall be the assassination or killing of his Royal Highness, or any direct attempt against his life or his person, whereby his life might be endangered, or he might suffer bodily harm. Then follows, in the 4th section, the proviso as to giving the benefit of the statutes 7 Will. 3, c. 3, and 7 Anne, c. 21, to persons accused, indicted, or prosecuted for treason made or declared by the act (57 Geo. 3), except in the cases therein mentioned of direct attempts on the life of any heir or successor of His Majesty, or any direct attempt on their persons. This statute extends to the compassing the death of the successor of the sovereign. The 6th section says, "provided also and be it enacted, that the statute of the 54 Geo. 3, c. 146, intituled 'An Act to alter the Punishment in certain cases of High Treason,' shall have the same effect as to sentences and judgments to be pronounced and awarded under this

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act as if this act had been made and passed before the said act of the 54th year of His Majesty's reign." Now, unquestionably, that is an act extended to every part of His Majesty's kingdom. But this act of 57 Geo. 3, c. 6, did, when originally passed, extend to Ireland; all acts which do not expressly exclude Ireland, or from which it is not plainly excluded, comprehend Ireland. I apprehend I need cite no authority for that; but this statute does neither the one nor the other. The 2nd section says, if any person "within the realm or without" shall compass, &c.; now what can that mean? The statute 1 & 2 Geo. 4, c. 24, provides that no person shall be tried or attainted except upon the oaths of two lawful witnesses; either both of them to the same overt act, or one of them to one overt act and the other of them to the other overt act of the same treason; and it is further enacted, that if two or more distinct treasons of divers kinds shall be alleged in one indictment, one witness to prove one of the treasons and another to prove the other shall not be deemed to be two witnesses within the meaning of the act. The act further provides that no person shall be indicted for treason unless the indictment be found within three years next after the offence committed. There were many things in the statute of Edw. 3 not comprehended in the statute of 36 Geo. 3, c. 7. In the statutes of the 39 & 40 Geo. 3, and also 57 Geo. 3, I called your lordship's attention to the care with which the Legislature has provided, not only that the trial shall be according to the ordinary course in cases of murder, but also that the party shall be ousted (in certain cases) of the benefits of the statutes of William and Anne; in the statute of 57 Geo. 3, it is done with such scrupulosity, that it only refers to those cases mentioned in the 39 & 40 Geo. 3, c. 93. The 2nd section of the 1 & 2 Geo. 4, proceeds to enact that trials shall be had as in cases of murder; but, departing from the course of the previous statute, it nowhere proceeds to oust parties from the benefit of the statutes of William and Anne, as was done in the former acts. The next statute to which I shall refer is the Crown and Government Security Act (11 & 12 Vict. c. 12). I trust I have shown that the treason of compassing the death of the sovereign, manifested by an overt act, was a treason declared by the statutes of 36 and 57 Geo. 3, and that parties indicted under those two acts were entitled to the benefits of the statutes of William and Anne, save in the excepted cases. The present indictment is for compassing the death of the sovereign; unless, therefore, it be brought within the provisions of the exceptions in the 36 Geo. 3, c. 7, and 57 Geo. 3, c. 6, the prisoner here was entitled to the benefits of the former statutes of William and Anne. The statute of 11 Vict. recites that doubts are entertained whether the provisions of the 36 Geo. 3, c. 7, made perpetual by the 57 Geo. 3, c. 6, extended to Ireland. But I think I could show that the Legislature did not think that those doubts had any foundation; but however that may be, if the Legislature does not declare anything to clear up those doubts, there cannot, at all events, be any intendment in favour of

them ; and whether I be right or wrong in saying that the 57 Geo. 3, c. 6, did of its own strength extend to Ireland, if I can find in those parts left unrepealed by the 11 & 12 Vict. c. 12, what gives those benefits, it is sufficient. The 1st section of the 11 & 12 Vict. c. 12, enacts that “the provisions of the said act of the 36th year of the reign of King George the Third, made perpetual by the said act of the 57th year of the same reign, and all the provisions of the last-mentioned act in relation thereto, save such of the same respectively as relate to the compassing, imagining, inventing, devising, or intending death or destruction, maim or wounding, imprisonment or restraint of the person of the heirs and successors of his said Majesty King George the Third, and the expressing, uttering, or declaring of such compassings, imaginations, inventions, devices, or intentions, or any of them, shall be and the same are hereby repealed.” Every one, therefore, of the provisions relating to the person of the sovereign are left unrepealed; the statute goes through every provision of the former statute, and takes them up one after another, and says that provision to which I have referred shall remain unrepealed; and is not that the treason of the statute of Edw. 3, which is left unrepealed? Then a party indicted for that treason is entitled to the benefits of the statutes (of William and Anne), except in the excepted cases, if the overt act be an actual attempt on the life of the sovereign. If then, in this indictment no overt act, coming within this exception, is charged, the plaintiff in error is entitled to judgment. One of the overt acts charged is a conspiracy to levy war against the Queen, to subvert the constitution, and put her to death. But can that be held to be a direct attempt on the life of the Queen? [PERRIN, J.—I suppose it will not be argued that the overt acts in the indictment come within the exception you allude to? *The Attorney-General*.—Not at all, my lord. PERRIN, J.—Then, Mr. *Fitzgerald*, you need not enumerate them.] Does not it appear from Foster Cr. L., that the overt acts laid in this case are the very overt acts held not to come within attempts to actually assail the person of the sovereign? The repeal of the provision, that no overt acts shall be proved except those charged in the indictment, has not by any act been extended to Ireland. As to the form of the plea, it is good in form, and rightly pleaded. *Frost’s case* (9 C. & P. 129), decides that the objection, if well founded, could not be taken after plea of not guilty, nor could it be taken until arraignment. If the prisoner had been later he would have lost the benefit of the objection, and in order to have raised it in the most solemn manner he could not have taken it before. In *Frost’s case* the objection was a more formal one than in the present: the objection was that the copy of the indictment, and lists of the witnesses and of the jury panel, though given more than ten days before the trial, were not given together—a majority of the judges were of opinion that the delivery of the list of witnesses was bad in point of law: secondly, a majority of them were of opinion that the objection was not taken in due

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time; and all of them were of opinion, that if the objection had been taken in due time the effect of it would have been a postponement of the trial, in order to give time for a proper delivery of the lists. The first difficulty I have to meet is, that not delivering these lists would have been cause of postponement only. If I can show that, according to the principles of pleading, there are pleas to the same effect as the present, I have taken the largest step possible to establish the validity of this plea. In Bac. Ab., tit. Pleas and Pleading, A., 326, it is said that the more frequent division of pleas is into dilatory or peremptory, "or they are, firstly, pleas in abatement; secondly, *such as suspend the action*; thirdly, *such as bar the plaintiff for ever*." I submit this plea came within the second class. It is not a plea in abatement, because consistently with the matters stated in it, the indictment may be perfectly good; nor is it a plea in bar; but that the prisoner be not compelled now to answer, which, if he does, according to *Frost's case*, the objection will come too late. [CRAMPTON, J.—What judgment do you say that the court below could have pronounced?] A remanet. Stephen on Pleading, App. 27, note to p. 67 of text. Such pleas suspending the action are not unknown to the law: parol demurrer is one of them; another is aid prayer. Excommunication only amounts to a suspension until absolution, and then the cause proceeds. Such a plea leaves the action in force, but hangs it up for a certain time. In *Lord Stourton and others v. Pierrepont* (3 Lev. 208), in debt for rent the defendant pleaded in abatement, by *petit judicium de breve*, &c.; for that one of the plaintiffs is a Popish recusant, and therefore *quasi excommunicat*, by stat. 3 Jac. 1, to which the plaintiffs demurred, and the court resolved that the defendant, to avail himself of that statute, must plead in suspension, and not in abatement, because the writ is not abated thereby, but only suspended. The plea of sanctuary was somewhat of the same kind; but the law is so obscure on the subject, that I do not wish to rely on it. If the objection on which the plaintiff in error relies is not sustained by this plea, I do not think it is in the wit of man to suggest any way by which it can be sustained; therefore I hope that the court will struggle to uphold this plea. [PERRIN, J.—Would you hold that, if the plea did not apply to one count, there could be a postponement of the trial?] The plea amounts to this, there is something which I am bound to answer, but not now. A plea to the jurisdiction is to a certain extent in the nature of a declinatory plea: (Com. Dig. tit. Plea in Abatement, D. 3.) In 3 Bac. Abr. 632, tit. Infancy and Age, L. 9, it is said—"In a writ of error upon a judgment for divers things against an infant, upon a recovery by his ancestor, if the infant disclaims for part, by which the judgment is to be reversed for error therein, yet for the nonage of the infant the parol shall demur for the rest, and this shall make the parol also to demur for that in which the infant hath disclaimed, because it is but one record; and, therefore, if he hath his age as to part he shall have it for the whole." [CRAMPTON, J.—It would be very difficult to

hold, that if your plea could be sustained, there could be a postponement as to one count and not as to all.] It is also laid down that "in an assize by three coparceners, if the tenant claims as tenant by the curtesy of the whole, and prays in aid of one of the plaintiffs in reversion within age, and hath aid of him by which the parol ought to demur for the third part, that belongs to the infant and not for the rest, yet, because the assize shall not be taken by parcels, it shall demur for the whole:" (Bac. Abr. tit. Infancy and Age, L. 9.) I do say that this applies more strongly to the case of an indictment. [The sixth point noted was abandoned.] The seventh point is the peremptory challenge. The statute of 1 & 2 Geo. 4 shows that then, at all events, the party had a right to challenge thirty-five peremptorily; the 9 Geo. 4, c. 54, s. 9, provides, that no person arraigned for treason or murder, or for other felony, shall peremptorily challenge more than twenty. As the law then stood, petty treason was not abolished, and I would submit that the meaning is, that it enacted that from such treasons as are like other felonies, the right to challenge more than twenty jurors peremptorily is taken away, and that these words, from their collocation, and the word "high" not being added, would import that it only referred to such treasons and not to high treasons, and the language of the statute of 22 Hen. 8, c. 14 (2 Hawk. lib. 2, c. 43, p. 505), would seem to import that such meaning was in the mind of the Legislature. The eighth point is, that the allocutus is bad, that the demand was not whether the prisoner had anything to say why judgment of death or execution should not be passed upon him: (*Rex v. Geary*, 1 Show. 132; *R. v. Speke*, 3 Salk. 258; and *Anonymous*, 3 Mod. 265; *R. v. Royce*, 4 Burr. 2086.) In capital cases the prisoner must always be asked the question. It is an essential part of the proceeding: (Com. Dig. tit. Indictment, N.) The precedents are all one way: (1 Chit. Cr. L. 700.) If the sentence is required to be entered on the record, is not this the most material part of it?

David Lynch, for the crown.—The first objection to which I shall advert is the form of the caption. [Here the learned counsel read the caption, which has been already stated]. Now if the caption went no further, it is a full and sufficient caption; it alleges the court at which the indictment was found, the persons who composed the court, and it goes on to aver that those persons were nominated and appointed in this behalf. What more, then, is required? They must aver against the record, if they say there is a want of jurisdiction: what is relied upon for the plaintiffs in error is, that the justices were appointed by letters patent, and that those letters patent were directed to them "and others." I shall merely refer to one or two authorities to show that this caption is sufficient. In 2 Hawk. P. C. lib. 2, c. 25, s. 119, edit. of 1824, it is said, "But it hath been adjudged that it is sufficient to set forth that it (the indictment) was taken before J. S., a coroner in the county, without saying that he was a coroner for the county, for that cannot but be intended;" and in sect. 123, Hawkins says, "Yet it hath been ad-

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judged that it is not necessary for the caption of an indictment taken at a general sessions of the peace, to style any of the justices of the quorum, because it sufficiently shows that one or more of them were such by showing that the sessions was a general one." In *R. v. Royce* (4 Bur. 2086), an objection somewhat similar was made, and the court held that it is not necessary to set out at length the commission of gaol delivery: that is, that by setting out that it was a Commission of Oyer and Terminer, and that it was the Queen's Judges who were there, it was enough. This is a matter in which, if there was a want of jurisdiction, the prisoner was not without remedy; for if the prisoner was tried by persons who had not jurisdiction, a writ of error might have been brought on that ground. The letters patent might have been produced; but the objection made here is averring against the record itself, and the court are asked to find that what is alleged by the record is false. In the case of *Rice and Hayes, in Error, v. The Queen* (2 Cox's Crim. Cas. 105), in this court in 1846; and in the case of *Fogarty, in Error, v. The Queen* (2 Cox's Crim. Cas. 105), the same form of caption was used, and no such objection was taken. As to the second ground of error, that the five counts on which the conviction was had are not sufficient in law, Mr. *Fitzgerald's* argument was founded on a proposition from which I dissent, that the treasons in this case depended on the stat. of Edw. 3. The treasons here are all treasons at common law: (3 Inst. 9.) In 2 Hale P. C. 189, it is laid down that "if an offence were high treason at the common law, and a declarative act of Parliament declares it so, as the statute 25 Edw. 3, *de proditoribus*, the indictment is good, with a conclusion *contra formam statuti*, or without such conclusion." The statute does not create the offence; it declares that what was treason at common law is treason: (Coke Litt. 141, b.) The common law of England was received into Ireland in the time of King John, so there must be, under any circumstances, a well charged treason at common law. One of the treasons declared in the Statute of Edward is, "if a man do levy war against the king in his realm:" is not the natural construction of Poyning's Law, that certain laws were found good and useful statutes for England, and, therefore, instead of passing the same statutes for Ireland, the Irish Legislature said, we will take them as applicable to Ireland; that is, "the statute passed in England shall be in force in Ireland, as if it were passed in Ireland concurrently with the English?" [CRAMPTON, J.—What do you say is the meaning of "this realm" in this indictment?] The *venue* where the offence is laid; Ireland is a realm of the Queen. It is objected that the words of this indictment do not follow the words of the statute of 25 Edw. 3. But that statute did not mean that the words which define the offences are to be used in describing the offence. It has never been held necessary, according to the course of precedents, to take up the words "his realm" in describing the offence of levying war against the Queen. The precedent in *Fost. C. L. 4-6*, supports my argument, and that indictment was held sufficient:

Watson's case, 32 St. Tr. 19; *ib.* 756; *Thistlewood's case*, 33 St. Tr. 709.) If the levying in Ireland be a treason, we have well alleged a levying war in Ireland against the Queen; the uniform course of precedents and of practice has been in accordance with this view of the enactments. It is contended that by the statutes, as they now stand in this country, the prisoners ought to have had the privileges of the statutes of William and Anne, but they are not entitled to any such. The foundation of Mr. *Fitzgerald's* argument has been this, that the 36 Geo. 3, regarding the treason of the death of the Queen, is co-extensive with the enactments of Edw. 3. The object of the statute was only to declare such portions of the 25 Edw. 3 as the times particularly required; and as regards the provisions relating to overt acts, the statute of Edw. 3, before the passing of 36 Geo. 3, applied to two classes; it embraced both the acts of compassing and the causing the actual death of the sovereign—cases where the consequences of the act would be the causing of the death of the sovereign: (Fost. Cr. L. 194; and *ib.* 196.) Before the 36 Geo. 3, was passed, the law of treasons stood by construction, as applicable to two classes of offences—such as aimed at the person of the sovereign, and such as by their consequences might imperil his life: (*Watson's case*, 32 St. Tr. 579.) What the 36 Geo. 3, did, was merely this, to take those acts which were more plainly acts of treason, and declare that the stat. of 25 Edw. 3, applied to them. The title of the act of 57 Geo. 3, c. 6, is “An Act to make perpetual certain parts of an Act of the Thirty-sixth Year of His present Majesty, for the Safety and Preservation of His Majesty's Person and Government against Treasonable and Seditious Practices and Attempts, and for the Safety and Preservation of the Person of His Royal Highness the Prince Regent against Treasonable Practices and Attempts.” It is a statute applying so much of the treasons declared as shall suffice for the preservation of the person of the sovereign; it was passed to prevent acts against the person of the sovereign, which we know at that time was necessary, and that was plainly the meaning of it. It was referable to acts personally affecting the sovereign; every one of its provisions were directed to that class alone; every one of those acts were treasons by the stat. of Edw. 3, but it is not co-extensive with that statute. If this view is right, the whole argument on behalf of the plaintiff in error is demolished, for there is nothing else to give him the benefit of these statutes. Acts had been done to the Prince Regent which made it necessary to extend the provisions of the act to him, to extend the personal protection to him. Does not that show that the Legislature in this case only regarded acts relating to the person of the sovereign, and not acts relating to the majesty of the sovereign? Now the title and preamble of the late act of 11 & 12 Vict. c. 12, are a legislative interpretation of the application of this statute, merely to cases of personal danger to the sovereign; the 36 Geo. 3, only applied to such treasons; it left uncovered a portion of the statute of 25 Edw. 3; leaving other cases to be tried and adjudged upon the

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statute of Edw. 3: when a treason like the present is only constructively against the person of the sovereign, it comes under the statute of Edward, and these statutes (of Geo. 3) do not apply. But there is another view of the case which, even if it be not plain on the other grounds which I have submitted, would seem to conclude the question. It cannot be contended that the 36 Geo. 3, c. 7, was more than an English act. The 57 Geo. 3, c. 6, by the 1st section, after enacting certain of the provisions of the previous statute of 36 Geo. 3, c. 6, makes them perpetual, but in the portion of the statute of 36 Geo. 3, mentioned in the 57 Geo. 3, there is no mention of trials; can it, then, be alleged that by the statute of 57 Geo. 3, the statute of 36 Geo. 3 was in that respect extended to Ireland? It is a well understood principle that where a temporary act is extended, it is the first act which forms the enactment, and not the latter; and it is so even where a temporary act has been allowed to expire, and the only effect is as if the first statute had been made perpetual the moment it was passed; for that I cite *Dingley v. Moore* (Cro. El. 1750); *R. v. Morgan* (2 Str. 1066); *Shipman v. Henbest* (4 T. R. 109); Dwaris on Statutes, p. 528, last edit. What follows necessarily is, that 57 Geo. 3 has done no more than make 36 Geo. 3 perpetual, as if it had been so made the day it was passed. It cannot be contended that before the 11 Vict. a party could be indicted for offences under the 57 Geo. 3. In Archbold's Cr. L., and the other books, the proceeding is always said to be under the 36 Geo. 3; but the 11 & 12 Vict. c. 12, does not render the 36 Geo. 3 applicable to Ireland. The section says, "Be it declared and enacted, that such of the said recited provisions made perpetual by the said act of the fifty-seventh year of the reign of King George the Third as are not hereby repealed, shall extend to and be in force in that part of the United Kingdom called Ireland." This declaration is not as in ordinary declaratory acts. The word "declare" is here used not to give operation to the past, but to provide for the future. It purports to declare what shall be the law for the future. A declaratory act is an act declaring what the law was from the very commencement of the act thereby referred to. The 2nd section of the 11 & 12 Vict. c. 12, is not a declaration of law antecedently existing. There is nothing in the late act giving the benefit of the statutes of William and Anne to parties indicted in Ireland; and there is nothing unreasonable in the construction for which I contend that the privileges conferred by those acts were not extended to Ireland; there may have been good reasons for it, but it is enough for me, without suggesting any, to submit that they, in fact, have not been extended. The statute of 11 & 12 Vict. speaks of two different things, the 36 Geo. 3, c. 7, and the part of it made perpetual by the 57 Geo. 3, c. 6. If before the passing of the 11 & 12 Vict. the prisoners were not entitled to the benefits of the statutes of William the Third and Anne, they were not now entitled. As to the plea put in, it is, I submit, no plea at all; it is not any plea known or recognized

the law; it asks the court to give a judgment which they could give. The judgment prayed is, "that he be not now compelled to answer" the indictment. There is no certainty in that: what is the event a party, if that judgment be given, being put forward the day and called on to plead, and then the same thing going on? If the plea is good, a man might never be capable of being tried, because by of the indictment is to be given when demanded, and then, if he did not choose to ask for it, he might never be tried at all. It is a matter of practice for the court below, and not the subject of the plea. [CRAMPTON, J.—What Mr. *Fitzgerald* says is, that the judgment which the court should give would be, that the trial be postponed to a particular day, and that the prisoner be remanded.] *Rookwood's case* (13 St. Tr. 155), and *Cook's case* (2 B. 330). Is this anomaly to appear upon the record: the prisoner is arraigned, and he makes no demand for these matters, yet pleads that he has not received them? [*Fitzgerald*.—A demand is necessary under the statute of Anne, it is under the statute of Will. 3. MOORE, J.—In England the things specified must be given without any demand.] The things specified in the statute of Anne; but the copy of the indictment must be demanded. [MOORE, J.—They must be given whether the indictment is demanded or not.] It is only a matter of practice. *Reef's case* (9 C. & P. 129), shows that these things are merely things to be claimed of the court below before trial. By the plea of sanctuary, a certain judgment was demanded, the pleading stood thus: after a man had abjured and confessed his crime, he prayed to be restored to sanctuary, but if taken, he had to plead sanctuary, and pray to be restored to sanctuary; that is a certain judgment. Suppose not guilty had been pleaded to the first five counts, and the plea in abatement was one admittedly put in, and capable of being put into the count charging the endangering of the personal safety of the Queen. [MOORE, J.—Your argument is, then, that it is a plea pleaded only to one count.] Yes; but it is too large if pleaded to the whole indictment; it is as if I had said, I won't plead to five good charges, because I have no right to be called on to plead to a sixth. The charges in the counts of an indictment are separate and must every one be answered. In *Wright v. Jamieson* (5 T. R. 553), the plea was held bad, because it was pleaded to the whole declaration, but it only answered one of the causes of action. [CRAMPTON, J.—The plea here is not a plea to any part of the indictment, but a protest against the whole indictment by the prisoner, that he ought not to be called on to answer any part of it.] *R. v. Shakespeare* (10 E. 83.) As to the question of the challenge by stat. 10 & 11 Car. 2, c. 9, which has not been referred to, it is only allowed in cases of petty treasons to challenge twenty peremptorily. In 9 Geo. 4, c. 54, s. 8, limiting the number of challenges, there is no restriction as to petty treason. As to the last point which has been argued, the form of the *allocutus*, I submit it is a

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correct one, though other forms have been used. In Comyn's Digest, tit. Indictment N., "so judgment ought not to be without a demand *si quid dicere habeat quare Judicium non, &c.*;" that is the question why any judgment shall not be passed: (*R. v. Geary*, 1 Show. 132; *R. v. Smith*, 3 Salk. 358; 4 Blackst. 375; *Sir John Perrott's case*, 1 St. Tr. 1326; *Southampton's case*, 1 St. Tr. 1333.) The very question which was asked in *Frost's case* (9 C. & P. 129), is, "what have you to say why judgment should not be given against you to die according to law?" But though that may have been a more formal mode, still it is not the whole judgment; for in treason the judgment is not merely of death, it goes further than that; the asking the prisoners is merely saying, if you have anything in the way of pardon or arrest of judgment to say, now is your time.

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Whiteside, Q. C. (for W. S. O'Brien), in support of the error assigned upon the caption, cited or referred to the following cases and authorities: *Leicester v. Haydon* (Plowd. 334); 3 Inst. 231; Bacon's Ab. tit. Authority D.; 2 Hawk. P. C. c. 50, s. 3; *Reg. v. Hewins* (9 C. & P. 789). In the precedents of important cases in the state trials, the words of the omission of which we complain are always found. When it is a commission issued to two or three "and others," it always states that those before whom the indictment was taken have authority to take it: (Chitty's Cr. Law, 191. Read the form of a caption reciting a commission of Oyer and Terminer. *Hardy's case*, 24 St. Tr. 230; *Horne Tooke's case*, 14 St. Tr. 651.) So in *Frost's case* (Gurney's Report, 13); *Frost's case*, Cr. Law, 3. Mr. *Lynch* has argued that the latter words, show the authority under which the court sat, are immaterial; that the previous parts show the authority, and that we are short at the word "appointed;" but how are the three judges authorized to sit at a special commission directed to two and others? As in the case in Plowden, where seven and eight others were authorized to take the indictment, the words of *Rex v. Royce* (4 Burr. 2073), which has been cited for the purpose, is, according to my interpretation, clearly the other way. The commission there was thus:—"of whom our said lord the king wills that the said Sir Henry Gould or James Hewat, Esq., shall be one;" and therefore Lord Mansfield said there could be no objection: so here, if the caption stated that our lady the queen willed that these three judges should be three of the commissioners to execute this commission, it would be well enough. As the second ground of error assigned—in cases of high treason there can be no extension beyond the exact letter of the law; "to slay a rebel out of the kingdom is not adhering to the king's enemies" (3 Coke Inst. 11.) That is put by Coke to show how exact the law regarding treason is: (1 Hawk. P. C. c. 2, ss. 28 and 4.) It is treason to slay the Lord Chancellor or judges in eyre, but it is not treason to slay barons of the Exchequer. There is one class of treasons which is local, the other not; such as compassing the death

of the king; the other class, such as bringing in false money, slaying the Chancellor, giving aid to enemies: (7 Rep. 23, 31, *a.*; 1 Hawk. c. 2, s. 87.) In 33 Eliz. it was resolved by all the judges that for a treason done in Ireland the offender may be tried, by the stat. 35 Hen. 8, in England, because the words of the statute are "all treasons committed out of the realm of England" (3 Coke Inst. 11): and they all resolved that Ireland was out of the realm of England. Therefore, if a man had committed treason in Ireland, he could have been tried in England, because it was out of the realm, and there was a special act of Parliament for that purpose. Now, as to whether levying war is in Ireland treason, nothing can be more clear than the distinction taken in this statute between the realm of England and the land of Ireland. We contend that, under and by virtue of Poyning's Act, the statute of Edw. 3 is to be taken here exactly as it stood, and that the court have no power to alter a letter. The Legislature has not framed any law to make it apply in terms to Ireland. The act of Edw. 3 is to be applied exactly as it stands; the portion of it in force in Ireland is to be applied there, and the portion not in force cannot be applied. It has been argued for the crown that this act of Edw. 3 is to be interpreted as if originally passed in Ireland; but that is not so: levying war in Ireland is not a "levying war within the realm" within the statute of 25 Edw. 3, any more than the importing the false money, mentioned in the act, is an offence in Ireland; the offence must be brought within the letter of the statute: (*Sheares's case*, 27 St. Tr. 255; *M'Cann's case*, 27 St. Tr. 399; *Rex v. Byrne*, 28 St. Tr. 805; *Oliver Bond's case*, 27 St. Tr. 523; *R. v. Roche*, 28 St. Tr. 753; *R. v. Kirman*, 31 St. Tr. 543; *Doran's case*, 28 St. Tr. 1041; *Emmel's case*, 28 St. Tr. 1097.) There is now no treason at common law, in consequence of the obscurity of the law and the decisions upon it: (4 Blackstone's Commentaries, 76; 3 Inst. 21.) Hale, in 1 P. C. 86, speaks very clearly to the same effect. There is no instance in modern times of any treason by common law. The plain meaning of the statute of Edw. 3 is, that no treasons shall be considered treasons any longer except those mentioned in it. The expression, "this realm," in the indictment, means the United Kingdom; but in the act on which the indictment is founded, the words are "his realm." [CRAMPTON, J. —What would you say is the meaning of "realm?"] I would say the United Kingdom. [Here the learned counsel read a portion of the indictment and the overt acts.] This charge is founded on the act of 25 Edw. 3, and I submit that it is an offence as much affecting the life of the sovereign now as ever. It is an extraordinary thing to say that endeavouring to destroy the government, &c., can be done without danger to the life of the sovereign. [I submit that the same interpretation must be given to the 36 Geo. 3, and to the 11 & 12 Vict., as to the 25 Edw. 3: the crime is in the intent; the overt act is only the means, it is not the crime: (1

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E. P. C. s. 54.) If the court were now for the first time to interpret the act, I am sure your lordships would give the same interpretation to it as has been from the earliest times, and hold that the thing charged here could not be effected without danger to the sovereign. In 3 Inst. 6, it is laid down to be an overt act of compassing the king's death, to imprison him, or take him into the party's power. Now these acts are not at all as strong as the words contained in the charge in this case: (3 Inst. 12; *Lord Essex's case*, 9 St. Tr. 491; *Lord Cobham's case*, 1 St. Tr. 220.) Lord Essex, though he had an affection for the sovereign (Hale's P. C. 110, 111, 119), yet, because he took possession of the person of the sovereign, was convicted and executed. From a war levied to dethrone Her Majesty, and to subvert the constitution, with great deference be it spoken, Her Majesty would be in much greater danger than from the shot fired by a half-maniac at Her Majesty as she was going along the streets of London. This indictment does not charge a levying war for a limited or partial purpose, but to destroy the constitution: (Hale, 197, 210, 211, s. 3; *Reg. v. Harding*, 2 Vent. 316; *Watson's case*, 23 St. Tr. 1390; *Hardy's case*, 24 St. Tr. 202, 204.) Therefore, upon the doctrine contained in some of those cases, the charge of endeavouring to subvert the whole constitution must involve an offence against the person of the sovereign: (*Horne Tooke's case*, 20 St. Tr. 730.) The king is bound to support his government. The 36 Geo. 3, c. 7, was not introduced for the purpose of extending or altering the law, but for the purpose of making overt acts of compassing the king's death high treason: (*Watson's case*, 23 St. Tr. 579; *Thistlewood's case*, 33 St. Tr. 919, per Lord Tenterden.) Everything that was treason was an offence against the person by the statute of Edw. 3, is so by the statute of 36 Geo. 3, c. 7, (read sect. 5); it is both a declaratory and an enacting statute. The 5 Geo. 3, c. 21, gave to persons accused a copy of the indictment five days before trial. The 36 Geo. 3, c. 7, gives the benefit of 7 Will. 3, c. 3, and 1 Anne, to all persons indicted for any treason made, or declared to be made, by this statute. The next act passed was 39 Geo. 3, c. 93, which provides that in all cases in which the overt act shall be the act of assassinating the king, &c., he shall not have the benefit of the statute of Will. 3; in every other case of compassing the death the benefit of the statute of Will. 3 is not taken away. Ireland is not excluded in terms from the 57 Geo. 3. Since the Union every act is just as binding in Ireland as if it was passed by the Irish Legislature; and so in a case where the question was, whether the 1 & 2 Geo. 4, applied to Ireland, because it was not excluded; and it was held to include Ireland: and as regards Scotland, it was so held by Lord Mansfield, in a case in Burrow. The statute 57 Geo. 3, in point of fact, is but declaratory of the law as it stood before, as to the value of the word "declare" in an act: (*Reg. v. Mills*, Jebb. & S. 352, per Perrin, J.) If he came to this country he would not be out of the protection of this statute; because

it does not exclude, it includes, Ireland, and gives parties indicted here the benefit of the 4th section. The 5 & 6 Vict. c. 51, does not specifically mention Ireland; but does not that act include Ireland, and, if so, why? Because it does not exclude it. The statute of 11 & 12 Vict. c. 12, is an act to assimilate the law; it describes a doubt, certainly, whether a particular part, namely, the 1st section of the previous statute, extends to Ireland; because, as to the applicability of the 2nd, 3rd, and 4th sections to Ireland, there could be no doubt: the language of the statute rather implies that the act did extend to Ireland. Cases have been cited to prove that acts to make perpetual former acts do not extend the former acts, but those cases, being decided before the Union, are no authority on the point. The statute of Vict. did not merely extend the crime to Ireland, but also the benefits of the previous statute. The doubt mentioned is a doubt which the Legislature manifestly thought was ill founded; the reason it omits mentioning the benefits of the previous statutes is, because there was no doubt about the provisions respecting them being in force. As to the validity of the plea—it is said, on the part of the crown, to be a mere subject of motion; but, if not by plea, the party has no mode of enforcing his statutable right. *Frost's case* (9 C. & P. 129), shows that if we had not pleaded before pleading to the indictment, we should have come too late (p. 141 of Gurney's Rep. of *Frost's case*); and as an indictment is an entire thing, if the prisoner could not be called on to plead to one count, he could not be called on to plead to the others: (*Rex v. Collins*, 5 C. & P. 305.) Even if, as is said by the counsel for the crown, the plea is only applicable to the 6th count, the act gives a right to a copy of the *whole indictment*; the *Attorney-General* might, if he had chosen, have entered a *nolle prosequi* on that count. As to the disallowance of the twenty-first peremptory challenge, the plaintiff in error ought not to have been deprived of his right to challenge thirty-five jurors, unless it has been clearly taken away; but it would appear from the language of the statute that the privilege was taken away only from the inferior kinds of treason.

The Attorney-General (Monahan) in reply.—I shall take up the questions in this case in the same order in which they have been argued on behalf of the plaintiffs in error. In the two cases cited by Mr. Lynch (*Fogarty v. The Queen*, and *Hayes and Rice v. The Queen*, 2 Cox's Crim. Cas. 105); the captions were identical with the present, and in *Gray's case* (11 Cl. & Fin. 427), and in *Shea and Dwyer v. The Queen* (3 Cox's Crim. Cas. 141), the captions were in the same form. The fact of the commission under which the prisoners in the present instance were tried being a special commission makes no difference. There is, however, this distinction on the subject between England and Ireland. In Ireland there is no such thing as what are known as special commissions in England, where they are commissions to inquire into the particular cases, as in *Thistlewood's case* (33 St.

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Tr. 683), *Watson's case* (32 St. Tr. 1). This commission is in the form used in Ireland directing the commissioners to deliver the gaol generally. The caption states that the session of Oyer and Terminer was held before the Right Honourable Francis Blackburne, the Right Honourable John Doherty, and the Right Honourable Richard Moore, "justices and commissioners of our said lady the Queen of Oyer and Terminer within the said county of Tipperary, nominated and appointed to inquire into, hear, and determine all and all manner of treasons, &c., within the said county of Tipperary, as well against the peace, &c., and also nominated and appointed from time to time, as need should be, to deliver the gaols of our said lady the Queen, of the said county of Tipperary, &c." The allegation of the caption here is that these justices were nominated and appointed to do a certain act, and that would be untrue in fact, if they were nominated and appointed with others whose concurrence was necessary to enable them to do the act; the court, in such case, could not have been held. The case of *Leicester v. Haydon* (Plow. 334), was different. It appeared that the commission was one to try a person on an indictment described by it to have been found before fifteen, whereas the indictment was, in reality, only found before eight. It was not necessary that it should have stated here before whom the sessions were held: it would have been enough to have stated that they were held before commissioners appointed for the purpose; all that is required is that it should appear by fair intendment that the commissioners who constituted the court did, in fact, do what they had authority to do. It is impossible to contend that these three justices were authorized to hear and determine offences in the county of Tipperary, if they were only authorized with others. No precedents can be referred to in which it has been held necessary to introduce the quorum clause. The next objection urged upon this record is, that there is no such thing in Ireland as the treason of levying war against the Queen. What I submit is that the statute of 25 Edw. 3 is merely declaratory of what the common law was, and not a statute creating for the first time or declaring any new treason (2 Hale's P. C. 189); and indictments for the treasons contained in the statute of Edward concluding without the words *contra formam statuti* would be good. I admit that the word "realm" in the stat. of Edward did not mean Ireland, and that up to that time it was called "the land of Ireland," and that the designation of the sovereign was Lord of Ireland. The fair meaning of Poyning's Law is that those acts which have been passed in England for England are to have the same effect in Ireland as if they had been passed there for Ireland. In some of the cases concerning the Duke of Devonshire's fisheries, a passage in a statute mentioning all weirs from the Trent to the Medway was held to apply to Ireland. But there is, in the statute 10 Hen. 7, c. 13, a legislative declaration that levying war in Ireland is treason. Upon the fair construction of these statutes it is plain that levying

war in Ireland is treason: (1 Hale's P. C. 147.) Levying horse-mail in Ireland was treason; but it was said that Poyning's Law having brought the statute 25 Edw. 3 into this country, that statute making the offence no longer treason, it was no treason in Ireland: (1 Hale's P. C. 155.) In the former passage it may be said Hale was merely reporting the opinion of others, but in the latter he gives his own. We have, therefore, the opinion of that very eminent judge in favour of the construction of Poyning's Act for which I contend. It is alleged that there is an informality in the indictment because we allege a levying war in "this realm," whereas the words of the statute are, "his realm;" but from the time of Hen. 8 downwards, the proper description of Ireland was the realm of Ireland, and in all the cases, down to *Frost's case*, there is no further description of the place given than "this realm;" but, at all events, in one of the counts the words "this realm" are omitted, and the offence is merely said in the indictment to have been in the county of Tipperary, which, of course, the court will take judicial cognizance of, to be in this realm of Ireland. As to the validity of the plea, it is contended, that if we went to trial on the 6th count alone the prisoner would have been entitled to the benefit of the provisions of the 36 Geo. 3, c. 7, giving the benefit of the statutes of Will. 3 and Anne; but it is not pretended that upon any one of the other counts he would have been entitled to those privileges; each and every of the overt acts would, if the statute of 36 Geo. 3, had never been passed, been overt acts of treason under the statute of Edward. It is not denied that this 6th count is exactly according to the precedents in *Brandreth's case* (32 St. Tr. 755), *Frost's case* (Gurney's Rep. 201), and *Thistlewood's case* (33 St. Tr. 681). Now, if it were so very clear that the offences in the other counts were treasons under the stat. of Edw. 3, what would have been the object of passing the stat. of 36 Geo. 3? It is perfectly plain, from the recital of that statute, and the mischief they wanted to guard against, that the Legislature was aware that it had previously provided for the compassing generally the death of the sovereign. The true construction of the statute of 36 Geo. 3 is, that it applies only to actual violence, or compassing actual violence, to the sovereign; and I would ask if the indictment charged attempting the actual death of the Queen, or compassing actual injury to Her Majesty, would it be supported by the overt acts laid? Mr. *White-side's* argument has gone a little too far; he says that the overt acts here go the length of showing a compassing of actual personal violence to the sovereign under the 36 Geo. 3; but if it does, then it places him in this dilemma, that it brings the case within the provisions of the 39 & 40 Geo. 3, c. 93, s. 4, which deprive the party in such cases of the benefit of the statutes of Will. 3 and Anne. Those portions of the 57 Geo. 3, regulating the mode of trial in England, are not the law of Ireland. Trials for treason in Ireland are regulated by the statutes 1 & 2.

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Geo. 4, c. 24 and 5 Geo. 3, c. 21. The Legislature, after passing acts in England, conferring certain privileges, thought fit not to extend the whole of those English provisions, but extended a part only to Ireland. If the 57 Geo. 3 ever extended to Ireland, it is only since the passing of the 11 & 12 Vict. c. 12. The very fact of a similar act not having been passed for Ireland, is, in my mind, a strong argument to show that the 36 Geo. 3 was meant to apply to cases of personal violence to the sovereign in the country where he was. The 57 Geo. 3 makes perpetual, but does not in terms extend, the 1st sect. of the 36 Geo. 3 to Ireland. Can it, then, be argued, that where an act makes a limited act perpetual, it makes it apply to places for which it was not originally made? There is a legislative declaration that the statutes of William and Anne do not apply to Ireland in the 5th sect. of the 57 Geo. 3, enacting that nothing in the act shall be construed to extend to prevent any prosecution to which the party would have been liable if the act had not been enacted. The 1 & 2 Geo. 4 recites the statutes of William and Anne, giving parties a copy of the indictment and jury panel; and yet, though the Legislature had those provisions before them, the statute of Geo. 4 does not confer the privileges. I use the latter statute to show that, at the passing of that act (1 & 2 Geo. 4), the 57 Geo. 3, c. 6, was not the law of Ireland, and that it is a legislative declaration that the statutes of William and Anne did not extend to Ireland. Now, upon the recent act of 11 & 12 Vict. c. 12, it is conceded that the only portion of the 36 Geo. 3 made perpetual by the 57 Geo. 3, c. 6, is a portion of the 1st section, and that those parts regarding the mode of proceeding to trial are not made perpetual, but that the provisions in that respect are extended by direct enactment; but, if not by that act, when were they so extended? If a change had taken place in the circumstances of this country since the passing of the 1 & 2 Geo. 4, c. 24, by which act the provisions of the former statutes were not extended, can it be supposed that the Legislature would not, when it had the act 11 & 12 Vict. before it, if it had seen fit, have extended to this country those provisions which were not extended to Ireland by the statute of Geo. 4? The 11 & 12 Vict. has enacted that, from a certain day, a certain provision of the former statute shall be extended to Ireland; and does not that leave the necessary inference that the other provisions were not before extended to Ireland? The objection raised by the plea here is not properly the subject of a plea, but of an application to the court. On such a plea no judgment known to the law could be given. It is not stated in *Frost's case* that he should have raised the objection by plea, but that he should, when called on to plead to the indictment, have applied to the court. There are several cases in which things are a good subject-matter of defence though not of a plea. The prisoner should have pleaded to the five first counts. I do not say that I could have gone to trial on those five counts and leave

the 6th count undisposed of. I could, in that case, have entered a *solle prosequi* on that count. If the objection only applies to the 3th count, I deny that the plaintiff in error can bring a writ of error to reverse a judgment of acquittal in his own favour on that count. Some cases have been referred to in support of this plea which have, in my judgment, no application—the instance which has been cited, that the parol shall demur if an infant prays his aid, only amounts to this, that the proceedings shall be delayed. It would only amount, in the present case, to this, that we could not go to trial leaving the 6th count undisposed of, because it would work a discontinuance. In criminal cases a man may plead different pleas to different parts of the indictment. I admit, that if to one count a man plead in abatement, and it is ruled against him, and judgment of *respondeat ouster* awarded, we could not, until that judgment, go to trial on the other counts, but that is because there could not be two trials on one indictment. As to the disallowance of the twenty-first peremptory challenge, the law in Ireland on the subject was governed by the 10 & 11 Car. 1, which limited the challenges in high and petit treason to twenty instead of thirty-five. The word “treason,” in the statute of 9 Geo. 4 clearly extends to both descriptions of treason. As to the *allocutus*, it is sufficient; the prisoner was asked why judgment should not be pronounced against him, and there was only one judgment which could be pronounced against him according to law. Upon the whole I trust, therefore, that the court will be of opinion that the judgment in this case ought to be affirmed.

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An application having been made on behalf of the other plaintiffs in error, who had each sued out separate writs of error, that the arguments on their behalf should be heard before the court pronounced its decision in the case of *O'Brien v. The Queen*, it was arranged on both sides, in order that the arguments might be heard during the present term, that one counsel should be heard on behalf of each of the plaintiffs, T. F. Meagher, T. B. M'Manus, and P. O'Donohue, and that then the *Attorney-General* should reply on behalf of the crown; and, accordingly, on the 23rd and 24th of November, *Butt*, Q. C., *Napier*, Q. C., and Sir *Colman O'Loughlen* were respectively heard for P. O'Donohue, T. B. M'Manus, and T. F. Meagher, and cited the following cases and authorities in support of their arguments, which, together with the errors assigned, were for the most part similar to those adduced in support of the errors assigned by the plaintiff in the first case: (a)—

Upon the form of the caption:—*Reg. v. O'Connell*, per Crampton, J., *Armst. & Trev. Rep.* 59; 2 *Hawk. P. C.* 18; *Falkner's case*, 1 *Saunders*, 248, note a.; 1 *T. R.* 320; 2 *Gabbett's Cr. L.* 139, 339; stat. 7 *Edw.* 3,

(a) Regard to our limited space compels us to omit the arguments, having given those of the counsel on each side in the preceding case, and the judgment repeating them.—ED.

W.S.O'BRIEN, 8 Geo. 1, c. 6; 2 Hale P. C. 167; *R. v. Fearnley*, 1 T. R. 316; Plowd. 485; Brooke's Ab. tit. Return Plac. 66; 1 Bulstrode, 105; Fost. Cr. L. 4; *Hardy's case*, 24 St. Tr.; *O'Coigley's case*, 26 St. Tr. 1204; *Thistlewood's case*, 33 St. Tr.; *Frost's case*, Gurney's Rep. Trials per Pais, 201; 3 Edw. 2, c. 5; 13 Edw. 1, c. 30; *R. v. Hinchey*, Batty, 509; *Conway v. The Queen*, 1 Cox's Crim. Cas. 210; 7 Ir. Law Rep. 149, (1844); *Meehan's case*, (unreported); *R. v. Atkinson*, 4 East.

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In support of the argument that there was no such treason as levying war against the Queen in Ireland:—Poyning's Act, 10 Hen. 7; 25 Edw. 3; 18 Hen. 6, c. 17; 1 Salk. 324; 1 Saunders, 121, a.; E. P. C. 76, 77, 85; *White v. Rose*, 2 Gale & Davison; *Batersby v. Scott*, 3 Scott, 11; Sir John Davies' Account of Ireland; *Gabbett v. Clancey* (per Sir Michael O'Loughlen, M. R.; Hales P. C. 155; 1 M. & W. 7; *R. v. Spaight*, 8 Taunt.

As to non-delivery of the lists:—*Thistlewood's case*, 33 St. Tr. 383, 918; 1 Hale P. C. 108, 130, 266, 322; 7 Co. Rep. 10 (b); *Storey's case*, 3 Dyer, 298; 6th Rep. of Crim. Law Commissioners; Coke Litt. 141 (b); *Wright v. Murphy*, Jebb. & B. 53; *Russell v. Ledson*, 14 M. & W. 588; *Edwards v. Bishop of Exeter*, 7 Scott, 652; 11 & 12 Vict. c. 12; 57 Geo. 3, c. 6; 36 Geo. 3, c. 7; *Twyn's case*, 6 St. Tr. 553; 5 & 6 Will. 4, (Apportionment Act); 6 & 7 Vict. c. 26; 8 & 9 Vict. c. 85; *Dingley v. Moore*, Croke EL 750; Bacon's Ab., Statute I., 322; 6 Geo. 4, c. 50, s. 21.

As to form of plea:—*Conway and Lynch v. The Queen*, per Perrin, J.; 1 Cox's Crim. Cas. 210; 7 Ir. Law Rep. 149, S. C.; Hume's Com. on the Law, 247-8; Alison's Criminal Law of Scotland, 322; Lilly's Prac. Reg. tit. Oyer of Deed; *Longueville v. Inhabitants of Thistleworth*, 2 Ray. 969; 6 Mod. 27; 3 James 1; *Anonymous*, 3 Salk. 119; *Lane v. Glenny*, 7 Ad. & El. 83; 1 Chitty on Pl. 372; 1 Saunders, 9, note (b); Hawk. P. C. lib. 2, c. 32; Hays's Cr. L., tit. Trial; *Godson v. Good*, 6 Taunt. 587; *R. v. Shakespeare*, 10 E. note in p. 85; *R. v. Wesley*, 10 E. 83; *Le Bret v. Papillon*, 4 E. 502; *Reg. v. Mitchell*, 3 Cox's Crim. Cas. 93, Q. B.; 3 Thomas's Coke Litt. 390, 400.

On the challenge:—Stat. 10 & 11 Car. 1; 9 Geo. 4.

As to the allocutus:—*R. v. Garside*, 4 Nev. & M. 33; Comyn Dig. Indictment, N.; *Anon.* 3 Mod. 265; 4 Geo. 4; *R. v. Walcot*, Salk.; Coke's Entries, 361; 1 Trem. P. C. 280, 311; 1 Lilly's Entries, 241; Cr. Circ. Com. 29; 4 Bl. C. App. 3; 4 Chitty Cr. L. 391; 2 Hale, 53; *Perrot's case*, 1 St. Tr. 1326; *Frost's case*, Gurney's Rep. 3 Mod. 117, 170; *The Duchess of Kingston*, 20 St. Tr. 625; *The Duke of Norfolk's case*, 1 St. Tr. 451; *Blunt's case*, *ib.* 1443.

The Attorney-General replied, citing in addition to the authorities he had referred to in the previous case of *O'Brien v. The Queen*, upon the question of the caption, Viner's Ab. tit. Error, 554; *ib.* Letter H. 9; 2 Hawk. P. C. 235; *The Queen v. King*, 7 Mod. 151.

Upon the error assigned upon the overruling the plea:—6 Geo. 1, c. 51; Dwarrris on Stat. 503-4 (referred to by opposite side).

Cur. adv. vult.

JUDGMENT.—January 16, 1849.

BLACKBURNE, C. J.—In these several cases writs of error have been brought to reverse the judgments and convictions for high treason pronounced at a special sessions under a commission of oyer and terminer and gaol delivery for the county of Tipperary. The errors assigned, and which have been argued, are the same in all, and I shall consider them in the order in which they have been argued at the bar. The first is to the caption of the indictment, that it does not show with sufficient certainty that the commissioners of oyer and terminer and gaol delivery before whom the convictions were had, had authority to hold the special sessions. The caption states that at a special sessions of oyer and terminer and gaol delivery before the two Chief Justices and Mr. Justice Moore, nominated and appointed to hear and determine, and from time to time, as need should be, to deliver the gaols by virtue of a commission under the great seal of Ireland, directed to them and others, it was found and presented. It is contended that this represents the commission as conferring a joint authority on the three judges named, and others. If this were so, the objection would be well founded; but I think this is not the import of the caption. It contains two averments, each independent of and distinct from the other; one, that the three judges were nominated and appointed to hear and determine; the other, that the commission whereby they were so appointed was directed to them and to others. Each of these refers to a different matter: one, the direction and address to all the commissioners; the other, to the operative part of the instrument: so distinct are these from each other, that the address contains not the least intimation of the contents of the patent, or of the authority it confers. Both of these being matter of record cannot be averred against, and must be taken to be true; nor is there any reason why they should not be both in fact true. A commission may be directed to many, and authorize them to fulfil its duties severally as well as jointly. The arguments for the plaintiffs in error assume that, because the commission was directed to others besides the three who acted, the statement that those three were nominated and appointed is necessarily falsified. But there is no contradiction between them; and it would be against all right and reason that one should be used to disprove the other, though standing on the same authority, and being therefore entitled to the same credit. Nor are the consequences of the assumption we are required to make to be lightly regarded; they are no less than the inculcation of the officer in making false entry, and of the judges in the illegal usurpation and exercise of the authority of this commission. There is no authority to warrant such an assumption; and it appears to conflict with the rule of law in favour of judicial and official acts, *omnia presumpta rite et solemniter acta*—a rule which might very reasonably be applied in the present case if it were necessary (which it is not) to sustain the proceedings of the high court, which is contended to have inquired and decided without jurisdiction. English precedents have been referred to to show that the caption in the present case deviates from them in form. Now, we must remember, that the caption is the minute or record of the clerk of the court of the proceedings in court, and of the commission which is delivered to him by the particular judges, to whom it is issued by the crown to be executed, and is then read by him in open court. As the contents of such commissions vary in a vast variety of particulars, so must the form of the captions. The precedents of commissions in England show that they differ from the forms of commissions in Ireland. We have judicial knowledge that the commissions for circuits here are joint and several, and may be executed by one, two, or more judges. I have had a search made for the forms of commissions in the Master's Office, and except in commissions for counties of cities and towns, in which, as in general in English commissions, there is a quorum clause, all commissions of oyer and terminer and gaol delivery, whether general or special, are joint and several, and authorize their execution by one, two, or more of the judges named in them. I have also had a search made for the captions of indictments in this court returned on writs of error and certiorari; and although a great many cases the ground of objection that is assigned to the present case does not exist, yet there are sixteen precedents in the form of that before in the certiorari returns, and within a very short time exactly similar captions

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of indictments are returned on writs of error, and in none of those was the matter of this objection ever alleged to be error. It is, therefore, very obvious from the precedents of commissions in use in Ireland, that a commission in the ordinary form would be truly described and recorded, if it were stated to be a commission directed to three and others, whereby three were nominated and appointed to execute it. It is not improbable that the present form was adopted to suit that of the commission; and for these reasons I think these captions are not erroneous. As I am the legal depository of this commission, I think it is not impossible that if I were silent as to its contents, it might be erroneously supposed that this caption is upheld by reasoning and arguments which the production of the commission would refute. I think it right to say, that any one, two, or more of the judges are expressly authorized to execute it; and there is no foundation, in fact, for the objection, that the court below had not jurisdiction. The second objection is, that it is not, and never was, high treason to levy war against the sovereign of these realms in Ireland. As I entirely dissent from the position and grounds on which that is rested, and think it is important, and mean to state my reasons for doing so, I shall not dwell on the answers suggested by the numerous precedents of indictments in Ireland on which convictions have been had, and which contain counts for levying war; nor shall I do more than express my concurrence in the position that this was treason at the common law, of which the 25 Edw. 3 was only declaratory. I come, therefore, at once to consider the proposition, whether the 25 Edw. 3 became the law of Ireland by the act of 10 Hen. 7, c. 10, called Poyning's Act. That that act made the 25 Edw. 3, the law of Ireland, with respect to the treason of compassing the death of the sovereign, is admitted; but it is at the same time denied that the offence of levying war, also declared to be treason by the same act, became treason in Ireland, because, as is said, we must read Poyning's Act as if it contained the words "his realm," and used them in the same sense as that in which they were used in the statute of Edward—that is, as meaning England, then the only realm of the king. If we yield to this argument, Poyning's Act must be understood and read to enact that it shall be treason to levy war against the king in his realm—that is, in England—which would be utterly nugatory and absurd. What could be the use or meaning of enacting, by an Irish statute, that that was, or should be, treason in England, which was and had been always so by the common law, or, at all events, from the reign of Edw. III.? The Irish Parliament had no right to declare what was, or to enact what should be, law in England. But if we must read Poyning's Act as if it used the very words "his realm," and if they cannot, without leading to the most absurd consequences, be understood to mean England, I can see no reason why they should not be held to mean Ireland as the king's realm or territory, over which he exercised sovereign authority by any style or title, and for which it was in the power of the Irish Parliament to legislate. That this is the effect of Poyning's Act is established by the authority referred to in the course of the argument by my Brother Perrin, Coke Littleton, 141, B. That states that Poyning's Act enacted, that all the statutes made in the realm of England before that time should be in force and put in use in this realm of Ireland. And to the same effect is the passage in 1 Hale, 147, which refers to the statute of 25 Edw. 3, as one of the affirmative acts which were introduced into Ireland, and made it treason to levy war therein. That this is the true meaning and effect of the statute will be so obvious as to preclude all doubt on simply referring to its language. After reciting that "there are divers good and profitable statutes made in the realm of England, whereby the said realm is ordered and brought to great prosperity, and by all likelihood so will this land if the said statutes were used and executed in the same," it is enacted, "that all statutes of late made within the said realm, concerning and belonging to the public weal, shall, from henceforth, be deemed good and effectual in the law; and over that, be accepted, used and executed in this land of Ireland in all points and at all times, according to the tenor and effect of the same, and over that by authority aforesaid, that they, and every of them be authorized, proved, and confirmed in this land." The mere perusal of this language makes it impossible to doubt that it was intended that the same offence which would be treason in England should be treason if committed in Ireland. But if any doubt still remained on the subject, it would be removed by 5 Geo. 3.

c. 21, the Irish statute, which enacts, that any person indicted in Ireland under 25 Edw. 3, shall have a copy of the indictment and counsel assigned to defend him. This recognizes and acts on the liability of a party to be indicted in Ireland for any of the offences which, committed here, are declared to be treason by that act, and of course includes the levying of war against the Queen. For these reasons I think that the second cause of error is utterly insupportable. The next cause of error is, the disallowance of the pleas. These indictments contain six counts, the first five are for levying war against the Queen, and the sixth is for compassing the death of Her Majesty. This sixth count states various overt acts, all of levying war or conspiring to levy war; and the two first overt acts are concluded with averments, that the purpose was to bring or put our lady the Queen to death. The plea of William Smith O'Brien to this count alleges, that the prisoner should not be compelled now to answer the indictment, because he says he is thereby indicted, amongst other offences, for compassing, imagining, and intending to put our lady the Queen to death; and that by the statutable enactments in that case made and provided, and now in force in this realm, any person indicted for compassing death or destruction to our lady the Queen is entitled to have delivered to him, ten days before his trial, in the presence of two or more credible witnesses, a copy of the indictment, and at the same time a list of the witnesses to be produced on the trial, mentioning their names, professions, and places of abode. It then avers, that the indictment was found on the 21st of September, on which day a copy of it was delivered to him in open court; but that no list of witnesses was then or at any time delivered to him, and that ten days had not elapsed since the indictment was so delivered. It concludes with a verification, and prays judgment that he may not now be compelled to answer the indictment. In the case of *Meagher v. The Queen*, the plea is the same, with the addition of an allegation, that he ought to have been, and was not, given a copy of the panel of the jurors who were to try him. The pleas in the other two cases aver, that by an act of Parliament of Great Britain in the 7th year of Queen Anne, it was enacted, that where any one should be indicted for high treason, a list of the witnesses and a copy of the jury panel should be delivered to him, and a copy of the indictment, ten days before trial; and it avers, that no list of the witnesses was furnished to them. The commencement and conclusion of all the pleas are the same. The Attorney-General demurred to all, and the demurrers were allowed. On the form of these pleas there has been a great deal of controversy and argument. Amongst other objections, the crown has strongly insisted, that the matter of them was ground of motion, not of plea. If we should decide that the pleas on that ground only, or on any matter of form, are invalid, the judges who presided below, and who refused the application by motion to postpone the trials, would undoubtedly adopt a course by which the consequences of their mistake would be obviated. So that I feel myself bound to consider what are the real merits of the case made by the pleas; that is, were the prisoners entitled to be served with copies of the indictments, and lists of the witnesses and panel, ten days before they were called upon to plead; or as two of the pleas put it, to the benefits given to persons charged with treason by the English act of 7 Anne, c. 7? The counsel for the plaintiffs in error contend, they are so entitled by the 4th section of the act of 57 Geo. 3, c. 6. This act of the imperial Legislature, they argue, is unrepealed and in force in Ireland. On the part of the crown it is insisted, that this section of that act did not, and does not extend to Ireland. The counsel for the plaintiffs in error, in the second place, contend, that even though this section of the act of 57 Geo. 3 did not originally extend to Ireland, yet that by the act of 11 Vict. c. 12, it has now become the law of Ireland. This is controverted by the counsel for the crown, who also insist that, were the effect of the 11 Vict. such as it is contended to be, the present indictments are not so framed as that the plaintiffs in error can take any benefit from it. These are the three distinct propositions which I now proceed to consider. In considering these important questions, it is necessary to refer to the state of the law both in England and in Ireland, when these different statutes were passed. The act of 25 Edw. 3, amongst other things, declared it to be treason to compass the death of the sovereign. The actual death of the sovereign, in the literal sense of the word is, and was always held to be, what the statute meant; but in admi-

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AND OTHERS, meditated directly against the person, but designs to subvert the authority
IN ERROR, and power of the monarch, the accomplishment of which would naturally put
v. his life in peril. Both were equally designs against the person, and equally
THE QUEEN. treason. The English act of 7 & 8 Will. 3, c. 3, in cases of treason, made

High treason. it necessary to prove the overt act or acts by two witnesses, entitled the party charged to a copy of the indictment five days before trial, and to have counsel assigned to him for his defence. The English statute of Queen Anne, which is referred to in two of the pleas, and is the foundation of the others, entitled persons so charged to a copy of the indictment, and a list of the names of witnesses and jurors ten days before trial. This latter act was not followed by any act of the Irish Parliament. The only act passed in Ireland before the Union on this subject was the 5 Geo. 3, c. 21; this was an act for the better regulating trials in cases of high treason under the 25 Edw. 3, and thereby every person so charged is entitled to a copy of the indictment five days before trial, and to have counsel assigned. The next statute is the English statute of 36 Geo. 3, c. 7, intituled "An Act for the Safety and Preservation of His Majesty's Person and Government against Treasonable and Seditious Practices and Attempts." The provisions of the 1st section of this act must hereafter be particularly referred to, and, therefore, I shall only observe of them here, that they were as to some treasons declaratory, and as to others enacting; that the treasons it deals with appear to be divisible into two distinct classes—one relating to treasonable attempts as against the person of King George III., or of his heirs, the other to treasonable practices and attempts against his government; that the act was temporary—to continue for the life of his then Majesty, and until the end of the session of Parliament next after his demise; and lastly, that although the offences thereby made treason will have that character, whether committed within the realm or without, yet the persons charged with them were triable only by courts of competent jurisdiction in England. The 5th section provided, that every person who should be indicted for any offence made or declared to be treason by that act, should be entitled to the benefits of the acts of King William and Queen Anne, as I before stated. This enactment in relation to persons charged with a treason, as to which the act was declaratory, would seem to have been unnecessary, for the acts of King William and Queen Anne were, and continued, in full force, and were made for the benefit of persons who might be charged with the acts of which this was declaratory. But it is more important to remark, that this act made the course of proceeding in England in all cases of treason precisely uniform, and put all persons charged with offences made treason by that act upon the same footing as persons indicted under the 25 Edw. 3. Soon after the passing of this act, the English Parliament found it necessary to deprive of the benefits of the acts of King William and Queen Anne persons who should compass the death of the then king, and commit an overt act of direct violence against his person; and, accordingly, the 39 & 40 Geo. 3, c. 93, enacted, that when the overt acts were assassination or direct attempts against the life or person of the sovereign, the person charged should be tried as in cases of murder. Such in England was the law under these temporary acts at the time when the 57 Geo. 3, c. 6, was passed: it is intituled "An Act to make perpetual certain parts of the Act of 36 Geo. 3, and for the Safety and Preservation of his Royal Highness the Prince Regent, against Treasonable and Seditious Practices and Attempts." The 1st section recites the 1st section of the 36 Geo. 3, and that it is necessary and expedient that such of the provisions of the said act as would expire at the end of the session of Parliament next after the demise of the crown should be further continued and made perpetual; and it enacts that all the recited provisions which relate to the heirs and successors of His Majesty, the sovereign of these realms, should all be, and the same are thereby made perpetual. The 2nd section extends to the Prince Regent the same protection which the 36 Geo. 3 enacts in relation to the then sovereign, making it treason to compass his death: and the 3rd extends the provisions of the 39 & 40 Geo. 3, to the case of direct attempts against the Regent's person. The 4th section enacts, that any person who shall at any time be accused, indicted, or prosecuted for any offence made or declared to be high treason by this act, shall be entitled to the benefit of the acts of King William and Queen Anne,

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save in cases of high treason, in compassing the death of any heir or successor of His Majesty, or the death of the Prince Regent, where the overt act alleged shall be assassination or any direct attempt against the life or person. This section is a repetition of the 5th section of the 36 Geo. 3, but it excludes from its operation the cases of treason specified in the 39 & 40 Geo. 3, without, however, providing, as that act did, that they should be tried as cases of murder. It is perfectly obvious that this, the 4th section, had reference to persons who might be indicted when and after the operation of the 1st section should commence, that is, at the end of the session of Parliament next after the demise of King George III. The question therefore is, could an indictment after that time be maintained in Ireland for any of the offences made treason by the 36 Geo. 3? In support of the affirmative, it is contended that Ireland is included because it is not excluded in express terms by the enactment of the 1st section. The rule of construction on which this argument rests must obviously be understood with a great deal of qualification. However general the words of the act may be, the object and nature of these enactments may make it necessary to read and construe them in a restricted sense, and to hold that it could not have been intended that they should operate according to their very letter. We must, therefore, see whether it was, or could have been intended to include Ireland in the 1st section of this statute. Whatever be the value of the omission of the words of express exclusion, it is certain that the statute does not contain any indication of an intention so to extend it, or to extend it in a manner to include any subject or confer any power which the 36 Geo. 3 would not have done had it been perpetual *ab initio*. The title, the preamble, the recital of all the English acts have all one single, common, and, I think, exclusive object, namely, to continue and perpetuate the recited provisions of the English statute. That object is strictly and simply executed in terms which show that there was no second or ulterior purpose. Indeed, I cannot reconcile the plain meaning of the words "continue and perpetuate," with any other idea or intention than that the law as it was should so continue after the time limited for its duration, from which time its duration was to be enlarged, and it was to become perpetual. Not only is any other intention at variance with the proper and common sense of the words used, but their meaning and effect in relation to the very subject are established by authority to be exactly the same. Lord Hardwicke says, in the case of *Rez v. Morgan* (2 Strange, 1066)—"When an act is continued every one is estopped from saying that it is not in force." And in *Dingley v. Moore* (Cro. Eliz. 1750), it was held that when an act which created an offence was made perpetual, without any new addition or alteration, the offence may well be supposed against the form of the first statute, for that is made to continue. This is the very case before us, for not the least addition or alteration is made in the nature or character of the offences recited and continued. But suppose it possible (which I confess I do not) to doubt the meaning of this section, can we ascribe to it the object contended for, that of making all these offences treason, and cognizable by the legal tribunals of Ireland, and that of assimilating the proceedings here, to those which are established by the English statutes of King William and Queen Anne? We must keep in mind that the act 36 Geo. 3 was not to expire until the end of the session of Parliament next after the death of King George III. Until that time it was to continue to be the law. Until that time the 57 Geo. 3, extending it, could have no immediate, present, or practical effect in England. Was it then to have immediate effect in Ireland? There is nothing in the act to warrant the position or assumption that it was to have a different period for its commencement in each country. If, then, its effect is to commence in both countries at the same time—that is, at the end of the session of Parliament next after the demise of King George III.—that postponement is utterly inconsistent with the alleged intention to assimilate the law and practice of the two countries; they would remain in the meantime as dissimilar as they had always been. Indeed, if any such an assimilation was intended, I cannot conceive any rational object of deferring in Ireland the operation of provisions made, and in present force in England for the safety of the person of King George III., his heirs and government, for the period during which the postponement must necessarily take place. But not only would the assimilation be future and revisionary, but at the utmost it would be partial and highly inconvenient. It would assi-

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milate the proceedings in Ireland only when the treason is one of those in the 36 Geo. 3, so that in all other cases, that for example of levying war, the persons charged would be only entitled to the benefit of the acts which regulate the proceedings in Ireland. So, if the levying of war be laid as an overt act of compassing the death of the sovereign, as it may, the course of proceedings will be different from that where the same fact is charged as a substantive treason. These, the necessary results of the construction contended for by the counsel for the plaintiffs in error form the most decisive and striking contrast to the practice in England; the assimilation to which is the object imputed to the Legislature, for there the practice and proceedings are uniform in all prosecutions for treason, as the statutes of King William and Queen Anne comprise and extend to all the treasons in the act of Edw. 3. I cannot, I confess, bring myself to think that a construction of the words of this act is rational or possible which leads to such consequences as I have referred to. Opposed to this construction, and corroboratory of the view I have taken of it, is the further important consideration, that the provisions of the act 36 Geo. 3, which it is contended extend to Ireland, are penal in the highest degree, and, therefore, not to be extended by construction. Best, Chief Justice, in the case of *Fletcher v. Soudes* (3 Bing. 580), says—" ' Penal laws ' are to be construed strictly, that no case should be holden to be reached by them but such as come within both the letter and spirit of the law." Were we to suppose the case of a person indicted in Ireland under this act, I cannot discover on what grounds it could be contended that he was within the spirit and letter of a law which was not, at its origin, the law of Ireland, which there was no intention expressed of extending to Ireland, and which by being perpetuated as it was, fulfilled all that we can reasonably imagine the Legislature to have contemplated. Great stress has been laid by the counsel for the plaintiffs in error on the recital of the act 11 Vict. c. 12, that doubts are entertained whether the provisions of the 36 Geo. 3, made perpetual by 57, extend to Ireland. These doubts, it is to be observed, do not relate to sect. 4 of that act, or to the question, whether persons indicted in Ireland for compassing the Queen's death, under the 25 Edw. 3, are entitled to the benefits of the English statutes of King William and Queen Anne. But it has been argued that the expression of these doubts, as to sect. 1, and the omission of any such expression as to sect. 4, show that there was no doubt that the latter section extended to Ireland. This is attributing to omission an effect perfectly arbitrary, and it may be met by as positive an assertion on the part of the crown, that no doubt was expressed for a very opposite reason—namely, because it was plain that sect. 4 did not extend to Ireland. But we have what at once decides, not only which of these inferences or assertions is the correct one, but is almost decisive of the whole matter in controversy. The act 1 & 2 Geo. 4, c. 24, is conversant of the very subject of the course of trials for high treason in Ireland. It begins by reciting two of the provisions of the English statute 7 Will. 3, c. 3,—one requiring two witnesses to the overt act or overt acts of treason; and the other, that no person shall be indicted unless the indictment be found within three years after the treason committed. It then recites that these recited enactments do not extend to Ireland; that it is expedient, just and reasonable that they should, and it enacts that they shall be so extended. This directly contradicts the assertion, that this statute of King William had already and theretofore been extended to Ireland; and at the same time, refutes the same assertion as to the act of Queen Anne, as both rest on exactly the same grounds; and if the act 57 Geo. 3 did not so extend the one, it could not possibly have extended the other. These various reasons have induced me to come to the conclusion, without any doubt, that sections 1 and 4 of the act 57 Geo. 3 do not extend to Ireland, nor is the conclusion in any degree weakened by the circumstance that some of the other sections of the act do or may relate to Ireland. The section before us is, in my opinion, by its terms, and the plainest tests by which we can arrive at the intention of the Legislature, limited to one definite purpose, which may be defeated, but cannot be advanced, by any presumptive intention derived from other sections of the act enacted for purposes equally distinct, and equally independent. I now proceed to consider the second question, which is the argument in support of the plea founded on the provisions of the act 11 Vict. c. 12. The 1st section of this act repeals all the pro-

visions of the act 36 Geo. 3, made perpetual by the 57 Geo. 3; and all the provisions of the 57th in relation thereto, save those which it enumerates, and which are all before set forth in the recital of the 36 Geo. 3. Section 2 of that act declares and enacts, that such of the said recited provisions made perpetual by the 57 Geo. 3 as are not thereby repealed, shall extend to and be in force in Ireland. What the recited provisions of the 36 Geo. 3, not thereby repealed, are, there is not the least difficulty in ascertaining. They are such as relate—I copy the very words—to “the compassing, devising or intending death or destruction, or any bodily harm tending to death or destruction, maiming, wounding, imprisonment, or restraint of the person of the heirs or successors of King George III., and the expressing, uttering and declaring such compassings as therein.” These are the recited provisions, and the only recited provisions of the 36 Geo. 3 which the 57th makes perpetual, and of necessity they are the only provisions which by sect. 2 are made law in Ireland. Sect. 4 of 57 Geo. 3 is not, and could not, be amongst them; so that it is impossible to say that it became the law or of force in Ireland. But it has been argued, that although sect. 2 does not in terms include or refer to sect. 4 of 57 Geo. 3, yet that that section is not repealed by sect. 1 of 11 Vict., but is included in the exception, and is, therefore, still in force, and available to persons that may be indicted in England; and from hence it is inferred that it is also in force in Ireland. But no such inference can, in my opinion, be made, for, giving to the exception the effect contended for, and assuming that sect. 4 of the 57 Geo. 3 is included in the exception, the consequence is not that it is to be in force in Ireland; but the consequence is, that the law in that respect is to remain unchanged, and that sect. 4 must continue to be, as it had been, the law of England. Any other construction would be repugnant to the language and intention of the Legislature; while this, adhering to the words of the act, continues the course of the proceedings in both countries as it had been theretofore regulated by the several statutes which have been so often referred to. This closes the observations I have to make on the second of those questions. But before I leave it, it is necessary to notice the argument according to the construction which has been urged by the counsel for the plaintiffs in error. They contend that if sect. 4 of the 57 Geo. 3 be not held to extend to Ireland, a person indicted here under 11 Vict. c. 12, for any of the treasons created by 36 Geo. 3,—for example, the treason of compassing to maim or wound—could not in his defence have any benefit from the Irish statutes, and must be sentenced to undergo the barbarous punishment of treason at the common law. I cannot adopt this view of the case as affording grounds for questioning the conclusion, which, I think, is the plain and just result of such a great number of considerations. But though I think, from the terms in which the 5 Geo. 3, c. 21, is expressed, there might be some question whether a person so indicted should have the benefit of its provisions, I think he would at all events be entitled to the benefit of the act 1 & 2 Geo. 4; and I further think that whatever may have been the reason for the introduction into the act 57 Geo. 3 of that of the 54th, the plain meaning of the 54 Geo. 3 was, to substitute the sentence prescribed in all cases in which, according to the existing law, the sentence for high treason was, or would be, that which it was the object of the statute to abolish. I now come to the position contended for by the crown, and I think successfully, that even if a person indicted in Ireland under the 11 Vict. c. 12, could be entitled to the benefit of the English statutes, the plaintiffs in error cannot be so, as they are not so indicted—the indictments not containing any overt act of personal violence, either actual or intended. I have already stated that 36 Geo. 3, c. 7, appears to me to refer to two distinct classes of treasons—the first class having for its object the protection of the person of the sovereign, the other the preservation of his authority and government. I think that these two classes are unequivocally recognized and distinguished by the act 11 Vict. c. 12. After a full recital of all the treasons made or declared by the 36 Geo. 3, the preamble states that its object is to repeal such of these provisions, so recited, as do not relate to offences against the person of the sovereign. This is a plain declaration that some of them do, and that others do not, relate to such offences—that some are in their nature personal, and others not so. The enactments that follow are in conformity with, and in exact execution of, the preamble. Sect. 1 preserves and

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continues the first class, by excepting it from the effect of the general repeal; and that every one of the offences so specified and excepted is, in strictness and in the common acceptation of the words, an offence against the person, whether by violence actual or intended. It is most important to observe, that the words which describe the treason of compassing the death of the sovereign are not those used in the act of Edw. 3, but are the compassing the death or destruction of the person; for these latter words at the conclusion of the enactment must be made to apply to every antecedent member of it. Sect. 3 of the act makes all the offences comprised in the second or repealed class, felonies, and amongst them there is not one which can be properly termed an offence against the person. I therefore have come to the conclusion, that though now, as before the recent act, the charge of compassing the death of the sovereign may be sustained under the 25 Edw. 3, by overt acts directed against her imperial authority, as well as against her person; yet the 11 Vict. is confined to the latter species of treason; and as this indictment is framed, it cannot be considered as founded on its provisions so as to let in these pleas, if in any view of these statutes the matter of them could have been made available to the plaintiffs in error. I have already, however, assigned my reasons for thinking that it could not. The result is, for these various grounds, and the reasons which I have stated, that I consider the demurrer to these pleas to have been properly allowed. The next error assigned is, the rejection of the peremptory challenge of a juror, twenty having been already challenged peremptorily. The counsel for the crown insist that the right is limited to twenty by 9 Geo. 4, c. 54, s. 9. The words of that act are—"That no person arraigned for treason, murder, or for other felony, shall be admitted so to challenge, or to challenge more than twenty peremptorily." On the other hand, the counsel for the plaintiffs in error contend, that the words "or for other felony" show that the section is conversant with felonies only, and that, therefore, we must read and understand the word "treason" as intended to signify the felony of petit treason. If this were the intention of the Legislature, the use of the word "treason" would have been superfluous, for, according to this argument, petit treason as a felony would be included under the words "or for other felony." But it besides appears to me, that the word "treason" is to be taken in its common, which is also its legal, sense as defined by Blackstone and other writers. Treason is the general appellation made use of by the law to denote, not only offences against the king and his government, but also that accumulation of guilt which arises whenever a superior reposes confidence in a subject or in an inferior. In Coke Littleton, 133 B., it is said, if any do compass the death of the Queen, and declare it by overt act, the very intent is treason. I have looked through a great number of statutes, in order to ascertain the sense in which the word "treason" is used and understood; and I have found, that the word without addition, and standing by itself, has uniformly been used to signify high treason. I have not discovered one in which it meant petit treason where that term has not been added to it. In many of the acts which I have examined, treason and high treason are used as convertible terms: for example, in 10 Hen. 7, c. 13; 13 Hen. 8, c. 1; 28 Hen. 8, c. 7; 33 Hen. 8, ses. 1, c. 1. The act of 3 & 4 Phil. & Mary, c. 11, is intitled "An Act whereby certain Offences are made Treason;" and so is the title of 2 Eliz. c. 1; and 11 Jac. 1, relating to Admiralty commissions, enacts, that all treasons and felonies shall be tried as therein. The 10 Car. 1, ses. 2, c. 18, enacts, that the justices before whom any party shall be brought for any treason, murder, or manslaughter, shall take examinations. And the 10 & 11 Car. 1, c. 9, on this very subject, is intitled "An Act for limiting Peremptory Challenges in cases of Treason and Felony." There are various other statutes in which the word "treason" is used to signify high treason. The act of Will. 3, relating to the observance of the sabbath, provides that warrants for treason may be executed on the Sunday; and 33 Geo. 3, c. 45, is an act for the trial of treasons committed out of the king's dominions. The very title of one of the acts referred to, that of Will. 3, is for the regulating of trials in cases of treason. There is a recent act, the 1 & 2 Geo. 4, c. 33, which enacts, that when on the trial of any person charged with treason, murder, or any other offence, it shall appear he was insane when the crime was committed, that certain proceedings shall take place. The very act before us, 11 Vict. c. 12, is

the 7th section, uses the word "treason" as describing high treason, no less than three times; and the 6th section quotes the statute of Edw. 3, and uses the same words. But if a more certain test of the exposition of this word was required, it is supplied by other sections of this very act, in which its meaning is the subject of inquiry. In the 8th and 11th sections, the word "treason" is not only used in its largest sense, but as contradistinguished from "felony." There can be no reason for giving it in the 9th and the intervening sections, a construction not only narrower than its natural import, and different from that in which it is used in such a vast number of statutes, but also at variance with the sense in which it is used in other parts of the very same statute. I have only further to remark, that the act of 9 Geo. 4, c. 54, did not introduce for the first time the restriction of the right of peremptory challenge. That restriction had existed from the time of Charles I., and was enacted by one of the very statutes to which I have already referred. So far, therefore, as regards that objection, I think there is no ground for it. The last error assigned is in the *allocutus*, that it was demanded of the prisoner whether he had anything to say why the court ought not on the premises and verdict to proceed to judgment? It is contended that it should have added, "to judgment of death," or "to judgment and execution;" and several precedents have been cited where these forms have been used, but none have been cited in which the judgment in the present form has been held to be void. The prisoner must have an opportunity afforded him by the court, either of moving in arrest of judgment or pleading a pardon, but when he is demanded to show cause why judgment should not be pronounced, he has that opportunity fully afforded to him. The demand made is the plainest intimation that, unless he can allege matter of law or fact as cause, such judgment as the court has power and is bound to pronounce, will be pronounced. The judgment here is that which is prescribed by the 54 Geo. 3, which does not use the word "execution," and uses the word "sentence" as synonymous with "judgment." I cannot attribute, as the counsel for the plaintiffs in error contended we should, any technical meaning which makes the use of the word "execution" absolutely indispensable. It would neither add to the sense nor explain the meaning of the word "judgment;" in that word are comprehended all the details that are to constitute the punishment, and there is no imaginable end to be answered by the enumeration of them. If, however, precedent and authority be required to sustain the present proceeding, I can refer to some. In 4 Bla. c. 29, he says, "The verdict being found, the prisoner is asked by the court, why judgment should not be awarded against him?" In Comyn's Digest, tit. Indictment, N., the form stated to be proper is, "*Si quid dicere habeat quare judicium non*," &c. In the case of *Rex v. Royce* (4 Burr. 2086), the question was, why judgment should not be pronounced upon him, and sentence awarded against him? Now, when "sentence" and "judgment" have the very same meaning, as the statute here shows they have, this is an authority against the position which it was cited to establish. Two of the other cases cited for the plaintiffs in error, viz., *Rex v. Stack* (Comb. 144), and *Betscomb's case* (3 Mod. 265), were cases in which there was no *allocutus* at all. In the former case, the very error assigned was, that the prisoner was not asked why judgment should not be given against him. There is, besides, the authority of the highest court in this kingdom, that of the House of Lords, in the *Duchess of Kingston's case*, for the very form which has been adopted here. For these several reasons I think this, as well as the other errors assigned, should be disallowed.

CRAMPTON, J.—At the risk of repeating much of the arguments and observations of my Lord Chief Justice, and with much less effect than they have come from him, I shall now take leave to state my reasons for concurring in his lordship's judgment in all its parts; and I do so, not from any sense of intrinsic difficulty in any part of it, but from the great importance of the case, both to the prisoners and to the public. Five objections or causes of error have been relied upon by the prisoner's counsel as showing that the conviction in the present case or cases is a bad conviction. I shall state those several objections, and observe upon each, not in the order perhaps in which they have been argued, and in which my Lord Chief Justice has taken them, but in the order in which I am now about to mention them. First, it is alleged that the caption of the indictment is erroneous. Secondly, it is argued that the sentence is erroneous,

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or at least the *allocutus* which precedes the sentence. Thirdly, the disallowance by the court of the prisoner's claim to challenge more than twenty of the panel is said to be error. Fourthly, the first five counts of the indictment, on all of which the prisoner was found guilty, are said to be bad. On the sixth and last count he was acquitted. Fifthly, that the allowance of the crown's demurrer to the prisoner's declinatory plea, as it has been termed, is also erroneous. Of these the fourth, or that which alleges error in the indictment, is the only one that would lead to a direct acquittal of the party. The other four would terminate, if successful, each of them in a *venire de novo*. Now, first, as to the caption. The question upon the sufficiency of the caption is certainly a question of jurisdiction, but, as it comes before us, it seems to resolve itself very much into a question of construction. The principles applicable to that question are not controverted. It is conceded on all sides, that the caption of an indictment should show that the prisoner was tried by a legal tribunal having competent authority to try him. That is the principle upon which the argument of the prisoner's counsel is founded, and that principle is conceded on the part of the crown. In the present case it appears by the record before us, that the prisoner was tried before three of the judges of the superior courts of law under a special commission held in September last, at Clonmel, for the county of Tipperary. The objection is, that these three commissioners, sitting alone, do not appear to have had jurisdiction by virtue of the commission under which they sat, inasmuch as it appears by the caption that the commission was directed not to the three only, but to others, not named, along with them. It must be admitted that the jurisdiction of the court was derived from the commission, and the commission only—and that if the commission appear to be, in fair construction, a joint commission merely, the trial was certainly *coram non iudice*; and this objection ought to prevail, for under such a commission (a joint commission) all the commissioners must have sat together in order to constitute a legal tribunal. On the other hand, it is equally clear that if the commission was a joint and several commission, giving authority to all the commissioners, or to one or more of them, to sit, the objection is removed. The caption does not aver the commission to be a joint commission, nor does it aver it to be a joint and several commission. The commission is not set out in the caption, nor perhaps even its exact legal effect stated. It is a short minute, according to the course usually adopted in such cases. We are, therefore, left to determine the legal character of this commission from the brief notice which the record gives us of it. The question is then, what is the fair import of the words of the caption itself, according to their grammatical meaning? Is it that the commission was merely a joint commission, or does it appear to have been a joint and several commission? The caption appears to me to allege these three facts, that the indictment was found before the three commissioners named in the caption at the time and place there stated; that these three commissioners were nominated and appointed to hear and determine all the treasons, felonies, &c., and to deliver the gaols in the county of Tipperary; that such nomination and appointment was by virtue of a royal commission dated the 1st of September, 1848, and directed to them and others. Now I take it that the fair import of these allegations is, that the trial, first, was held before the three commissioners *only*—that was part of the argument of the prisoner's counsel; secondly, that the three special commissioners were the *only* commissioners who were nominated and appointed to deliver the gaols at Tipperary; and thirdly, that that nomination and appointment was made, not by the terms of the commission itself, but by virtue of the commission. In the case of a joint commission merely, all the commissioners, as I before observed, must sit together to make a legal tribunal. In the case of a joint and several commission one or more commissioners sitting constitute a legal tribunal. In the latter case, the commission erects the tribunal; but who are to sit? Not all unless all are called on so to do. It remains for the crown to nominate one or more of the commissioners specified in the commission, to be the acting commissioners. This nomination I take to be substantially made in this country by the delivery of the commission to the selected judges. Now, if we suppose the present commission to have been a joint commission merely, the statement of the caption, that the three commissioners were nominated and appointed to deliver the gaols, would be false. They were

not so nominated according to this supposition, but those three with others were so nominated. Whereas, if we take the commission to have been a joint and several commission, which it may be compatibly with the statement, then all is consistent, the commission is, in fact, according to this caption, directed to the three named and others. That proposition is satisfied. So far all are equally and generally authorized to sit; but three only of the tribunal are nominated by the crown specially to act under the general commission. As I before stated, I take that nomination or selection to be, by the delivery of the commission to the special commissioners. No other commissioner named in the commission presumes to sit, not having been called on so to do, or nominated by the crown for it. There are, then, the two things here, there is the authority given by the commission itself, and there is the selection from amongst the commissioners, which is an act of the crown's prerogative, and therefore the language of the caption is, that the nomination of the commissioners is *by virtue* of the commission. I take the language to mean, *not* that these three special commissioners were nominated to sit alone by the terms of the commission, but *that* by virtue of the commission and the inherent power of the crown they are so nominated. Now the English commissions, and the captions founded on them, form no precedent for us on the present occasion. They are directed to commissioners named in the commission, of whom certain are to form a quorum, the others are merely associates, sometimes indeed made so by a separate commission, and the caption, therefore, describes the proceedings as being before the quorum or a sufficient number of them by name, or before them and others not named, who are the associates. With us, the half-yearly circuit commissions are uniformly directed to the twelve judges and certain of the law officers of the crown without any quorum clause (except in a few cases in which the mayor is associated in cities or in towns), and they are, in fact, uniformly joint and several commissions in the very terms of them. I have no less than thirty of them in my own possession, directed to myself and other commissioners with whom I have been named. Now the caption in England describes the commission as directed to be quorum and others, and states the proceedings to be before that quorum and others. In Ireland the caption describes the commission as directed to all the judges nominated to the particular duty, and to others not named; but *states* the proceedings as being before the judges nominated, or before them and others according to the fact. The caption in both countries states, or should state, the facts according to the truth, that is, the short minute merely of them. The word "nominated" is not found in the English captions at all. I observe the term used there is always "assigned." We use the words "nominate and appoint" to express the selection or nomination of the particular judges, and we say that nomination takes place by the delivery of the commission. In England the course is different; there is a previous nomination by fiat from the crown. Every assize commission is the result of a fiat of the crown, nominating the particular individuals to whom the particular commission is to be directed; and the commission is to be directed only to those named in that fiat; and sometimes there is a new fiat to include an additional name. This will be found in Mr. Ritty's book. Now, I observe that the writ of error which has been sued out in this case is confirmative of the view which has satisfied my mind that this caption is sufficient. I own I had some difficulty at first—and indeed it is the only part of the case on which I ever entertained any difficulty—but the writ of error sued out by the prisoners' attorney is confirmative of this view. For what is that writ of error? The writ is directed to the Right Honourable Francis Blackburne, Chief Justice of the Court of Queen's Bench, and the other two judges who sat at the commission, Chief Justice Doherty and Judge Moore—"three of our justices appointed to hear and determine all treasons, felonies, and trespasses committed within our county of Tipperary, and to deliver the gaols." and what is the requisition? "We command you, that if judgment be given hereupon, you send to us, distinctly and plainly, under your seal, or the seal of one of you ———." What is the meaning of "under the seal of one of you?" A case was cited by Sir Coleman O'Loughlen which shows the meaning of that. If all the commissioners must have sat to make a legal tribunal, the return must certainly have come from all who sat at that commission. Here the writ goes to the three who did sit, and following the character of the commission itself, it

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suggests that the return may be made either by three or by one. Now, I would say (secondly, though we cannot, perhaps in a legal point of view, look outside the record), looking to the commission itself, it certainly is satisfactory to know that the construction which the court is now putting upon this caption is in exact accordance with the truth of the facts. The very commission has been produced to us—I mean to the judges of this court—by my Lord Chief Justice, he having the commission in his custody; and we find it to be a joint and several commission, directed to all the judges and law officers as usual, including, of course, the three judges who sat at Clonmel. And, as I before intimated, we know from our judicial experience that such is the usual and established form of commission for the assizes, and there is no difference between what is called the form of a special commission in this respect and the ordinary commission issued at every assizes. We also know, judicially, that it is the usual and ordinary course for the crown, under such special commission, to select two or more of the judges in whom they may have especial confidence, and to nominate and appoint them to be the special commissioners; so that the course of judicial experience—the special commission, if we are now to look at it—are all in agreement with the deductions which I have been making from the terms of the caption itself; and unless we make that deduction from the terms of the caption, we are obliged to make one part of the caption contradict the other. But I should say further for myself, I hold it would be the duty of this court, if there were a formal error in this return—if the act of the officer had made this return an informal and incorrect return, it would be the duty of this court to make the amendment, if it became necessary so to do, and the crown called for such an amendment. The caption we all know is no part of the indictment. It is but the ministerial act of the officer, the clerk of the crown, giving to the court its proper title, and showing the time and place of the proceedings which took place before the judges. It is not doubted, and it has never been doubted, that a formal error in the caption of an indictment such as this, upon a conviction for murder, or for any other crime except treason, would be amended by the court. The authorities are express on the subject. *Atkinson's case* (4 East), and *Rex v. Marsh* (6 Adol. & Ell.), are quite decisive on this subject. But it has been suggested by one of the counsel who argued this case on behalf of one of the prisoners, that the court has no such power in cases of treason alone. No authority or precedent whatever has been cited for the distinction that was assigned; but this argument was addressed to the court, that as a prisoner on trial for high treason was entitled (along with the copy of the indictment) to a copy of the caption also, that the caption cannot, after the copy has been delivered to the prisoner, be altered or amended. But that is an argument which cannot be for a moment acceded to. By the terms of the statute giving this privilege, both to prisoners in England and Ireland, the words used are, "a copy of the whole indictment;" and by an early construction *in favorem vite* made by the judges upon this statute, knowing that the caption was as necessary for the prisoner as the indictment itself to enable him to plead, they made this liberal construction—that he should not only have a copy of the indictment, but also a copy of the caption, as the caption might be necessary to enable him to show a want of jurisdiction in the court, or in the grand jury who found the bill. It is also, however, held, that the prisoner after pleading cannot object to the sufficiency of the copy. The plea admits a copy to be correct. Thus the giving of the copy is merely to assist the prisoner in framing his plea, and so say the authorities; and that having been done, the object of giving the copy is complete; and the subsequent amendment in matters of mere form, and the act of the officer, cannot in any degree affect the plea or defence. Therefore there can be no such distinction. Now, it is unnecessary for me to refer to the precedents for this caption after what my Lord Chief Justice has stated, but they are numerous in this court, and I think I may add, that some of them have passed the ordeal of the Lords without being objected to. It therefore appears to me, for these reasons, that the objection to the caption in this case ought not to prevail. The second objection in the order I have stated them is to the form of the *allocutus*. That there is abundant precedent for the form is admitted, and upon principle the objection ought not to prevail; for when the prisoner is asked, as he appears to have been upon this occasion, before his sentence is pronounced, whether he had

anything to say why the court should not proceed to judgment against him for the treasons of which he had been found guilty (that is the form in which the question is put), he is substantially asked why the court should not proceed to judgment of death against him, for judgment in treason necessarily by law imports judgment of death. The next question that I notice is, whether the prisoner had a right peremptorily to challenge thirty-five of the panel, or only, as decided by the court below, twenty; for the effect of the crown's demurrer being allowed by the court was to decide that the prisoner's right or power of challenge was limited to the number of twenty. The stat. 9 Geo. 4, c. 54, s. 9, appears to me express upon the point:—"If any person so arraigned for treason or murder, or for other felony, shall peremptorily challenge more than twenty——." The consequences stated by the act of Parliament follow. Now, the argument of the prisoners' counsel is, that the generic word "treason" means in this section petty treason, to the exclusion of high treason; that the class described means the secondary species belonging to the class, and means to exclude the principal. That is the argument of counsel, and it is founded very much upon a verbal criticism on the words of the section, which I do not notice, as it has been already observed on by my Lord Chief Justice. But I would ask, how can we restrain, as we are called on to do, the legal and comprehensive meaning of the word "treason," of which there are, or rather were, two species (for one of them has been taken away by a late statute), high treason and petty treason, especially when we find in all the statutes, both ancient and modern, on the subject of treason, the word "treason" is used to signify either the two classes of that crime or high treason only? There is not a single statute (unless this is an exception) in which the word "treason" is ever employed to signify petty treason exclusively. But again, there are two other sections of this statute in which the word "treason" is used manifestly in the same enlarged sense—in the general and legal sense. Sect. 8 says, "If any person being arraigned upon, or charged with, any indictment or information for treason, felony," and so on, "refuses to plead." Is it to be contended that high treason is not comprised within that 8th section? Again, in the 11th section—"that where any person shall be indicted for treason or felony, the jury empanelled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony." And in the case of that late statute to which my Lord Chief Justice referred with respect to insane persons, can it be contended for a single moment that it was not meant by that statute to apply the word "treason" to high treason as well as to petty treason? But independently of these observations, we should recollect that the statute of 9 Geo. 4, to which I have just adverted, is a consolidation statute. It recites a number of statutes in its preamble, and it repeals those statutes either totally or partially. One of the statutes so recited, and so repealed for the purpose of being re-enacted, is the statute of 10 Car. 1. Now, what are the terms of that statute? It enacts "that no person arraigned for any offence or offences of high treason, petty treason, murder, manslaughter, or any other felony." In the very language (except that the words "high treason" are omitted) of the section that is now the subject of observation,—"he shall not be permitted to challenge peremptorily above the number of twenty." That is, in high treason and petty treason. These two classes are consolidated into the generic word "treason." From the time of 10 Car. 1, c. 9, down to the time of the enactment of 9 Geo. 4, the law of treason, as regulated in Ireland, was emphatically, that the prisoner, in cases of high treason and petty treason, could challenge peremptorily only twenty. In England it is otherwise, we know; and indeed the great foundation throughout the argument of this case has been, that the object of all or many of these statutes has been to assimilate the practice of Ireland to the practice of England, and the law of Ireland to the law of England; and yet we find manifestly a difference between the law of Ireland and the law of England on this subject and many other subjects. Assimilation may be a very desirable thing, but assimilation must be done by the Legislature, and not by interpreters of the law; and when it comes to be considered whether there shall be a complete assimilation, it will be a subject of serious consideration, whether many portions of the Irish code of laws may not get the preference over portions of the English code of laws on the same subject.

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In England, the right, the power of challenge, in the cases of high treason, stands on the common law. There is a section in the Jury Act of England which was referred to, by which in all cases of felonies the prisoner is allowed to challenge only twenty peremptorily. We have not adopted in the Irish Jury Act any such section. The law in Ireland stood on one footing, and still so remains, according to my judgment, and in England on another footing; therefore I think there is no difficulty whatever with respect to this objection. The fourth objection in the order in which I am noticing them is, that the first five counts of the indictment are bad in law. These counts charge the prisoner with levying war against the Queen in her realm of Ireland; and it has been gravely argued by five learned counsel in succession, earnestly and strenuously, no doubt, that it is not treason to levy war against the Queen in Ireland. Now I must say, this is as startling a proposition as I ever heard put by a counsel to a court; and I must own it came upon me with very great surprise, with as much surprise as the assertion would, which perhaps is only kindred to it, that there never had been a traitor, and that there never had been a rebellion, in Ireland. The argument is this, that the 25 Edw. 3, applied only to war levied in England; and the extension of that statute to Ireland by Poyning's Act can only therefore apply to war levied in England; and it leaves the levying of war against the king in Ireland unprovided for. The old construction, which has been uniformly held and acted on in this country, was, that the effect of Poyning's Act, in extending the 25 Edw. 3 to Ireland, was to apply it to treasons committed in Ireland. The 25 Edw. 3 was a beneficial statute for the subject. It removed the vagueness and uncertainty of the common law of treason, defining with accuracy and precision what, and what only, should constitute the crime of treason; therefore it was certainly a benefit to extend that law to Ireland. And now, I would ask, can anything be more absurd in statement than the practical result to which the arguments of the prisoner's counsel would bring the enactments of this statute? They say it has been made an imperial act, embracing England only—a mere *brutum fulmen*. It was not to apply to Irish treasons at all; it was to apply to English treasons, and English treasons which could not be tried in Ireland. Anything more monstrous or more absurd in the way of suggestion, as to the meaning or intention of the Legislature, I own I never heard. But I would say, secondly, in order to adopt this perfectly novel construction, we must do violence to the language of Poyning's Act itself. Poyning's Act requires that the English statutes referred to in the preamble of it, one of which is the 25 Edw. 3, shall be used, executed and accepted in this realm of Ireland according to their tenor and effect. Now, how could these English statutes be executed within the land of Ireland if Irish treasons were not triable by them under the 25 Edw. 3, or if no other practical conclusion was arrived at than the making the 25 Edw. 3 an imperial act? But, above all, how could the reason for introducing it into Ireland be satisfied? For, what is that reason? Because it says, that the object was to bring Ireland like England to wealth and prosperity. How such a practical result could be achieved by the construction of the learned counsel I cannot understand. Surely the object of the Legislature was, to suppress crimes and disorders in Ireland by the introduction of this wholesome statute, and thereby to bring wealth and prosperity to the country. There is a statute which I believe is strongly illustrative of the true meaning and construction of Poyning's Act: I refer to the act 28 Hen. 8, c. 7, which is called an Act of Slander. This statute recites the whole of the English act of treason called the Act of Slander, and at the close it extends to Ireland that Act of Slander, almost precisely in the terms in which Poyning's Act would extend the 25 Edw. 3 also to Ireland; and it recites, as is done in Poyning's Act, the beneficial character of the statute. "Considering this statute, made in the realm of England, is most beneficial and expedient to have the execution within the King's land and dominions of Ireland." Why? "Especially in respect of the high rebellion here lately committed, and that the odible infamies against the King and Queen," and so on. However, there is another view of the subject, which I think is quite decisive: the act of 5 Geo. 3, c. 21, which was passed in the year 1765, appears to me to put an end to all difficulty or question, if any could arise on this subject. The recital of that statute is, that the 25 Edw. 3, is the existing law of treason in Ireland—"Whereas it is highly reasonable and agreeable to the nature of our

excellent constitution, that persons prosecuted for high treason under the statute of 25 Edw. 3, should be allowed all proper means for defence of their innocence." Here, then, is an express statement by the Legislature, that the act of 25 Edw. 3 does apply to Ireland; that it is the law of Ireland; and on that supposition it makes an enactment with respect to regulating the practice of trials of indictments founded upon that statute. At the time when 5 Geo. 3 was passed, there were no other treasons in Ireland but those under the statute 25 Edw. 3; and the language of this statute, and the reason in the preamble, seems to me to be so strong, that I would not consider it to be a construction doing violence to the intention of the Legislature; but, on the contrary, carrying that intention into execution, if this statute were to be considered as having the effect of meeting all cases that should thereafter become the subject of prosecution for treason in an Irish court, and making them subject to the regulation and enactment of that statute. However, that is another matter. I therefore think there is nothing in this objection; and indeed one of the learned counsel for the prisoners admitted, although he argued strenuously in support of the objection, that it was an objection apparently against common sense; and I certainly, for my own part, am disposed to agree in that part of the learned counsel's argument. Now I come to the fifth and last objection which I have to notice; and that arises on the declinatory plea, as it has been called, and the demurrer to it. And two questions seem to me to arise on this plea, without entering into any discussion on the mere terms of it: first, whether the principle of the plea be well founded? secondly, whether, if well founded in principle, such matters are suggested in it be at all the proper subject of a plea? The principle of the plea is, that the prisoner was entitled to a copy of the indictment against him ten days before his trial, whereas in fact he had the copy only five days before his trial. Now, the solution of the question raised by this plea depends on the consideration, whether the trial of a prisoner for high treason in this country is to be regulated by the Irish statutes of 5 Geo. 3, and 1 & 2 Geo. 4, or by the English statutes of Will. 3, and 7 Anne, c. 21. The Irish act of 5 Geo. 3, c. 21, enacts that every person tried in Ireland for any treason under the statute of Edw. 3, shall have a copy of the whole indictment delivered to him five days before his trial. That is the Irish regulation. The act of 1 & 2 Geo. 3 extends to Ireland certain of the provisions of 7 Will. 3, c. 21 (by-the-by, an useless and absurd proceeding, if the objection be well founded), because that act must have applied, according to the argument of the prisoners' counsel, previously to Ireland; therefore it would be absurd and unnecessary to make any portion of it the law of Ireland. Now under these Irish acts the trials of the prisoners were conducted; and the argument of their counsel is, that the trials should have been regulated by the English statutes, the latter of these statutes, the statute of Anne, entitling the prisoner tried under its regulation to a copy of the indictment, not five days, but ten days before the trial. It is admitted, because it cannot be denied, that the Irish acts regulating the trial of treason in Ireland have never been repealed. Now, that is a strong statement, leading to a conclusion on this objection. They have never been repealed; but it is suggested that there is a species of implied repeal in the acts of 57 Geo. 3, and 11 Vict., or one of them. The argument of the prisoners' counsel is what I have just stated, that the English acts were, by 57 Geo. 3, c. 6, or 11 Vict., or one of them, extended to Ireland, and therefore these statutes should now regulate the trial of treason in Ireland, superseding the unrepealed Irish statutes to which I have before referred; or at least it is urged that the trial of all treasons founded on the late act of 11 Vict. c. 12, should be so regulated. Now, I think there are two false assumptions on which this argument rests. First, the 57 Geo. 3 did not extend to Ireland the English acts regulating trials; but, secondly, if it had it would not avail the prisoners on this argument. The act 1 & 2 Geo. 4, c. 21, furnishes a decisive contradiction to the notion that the 57 Geo. 3, c. 6, embraces Ireland in its provisions. What is that act? That act recites certain provisions of the 7 Will. 3, and it then goes on to recite, "And whereas the above-recited enactments and provisions do not extend to Ireland, and it is expedient, just, and reasonable that they should be extended to Ireland." The argument for the plaintiffs in error is founded on the assumption, that all these recitals in this statute are a mistake of the Imperial Legislature, for that four years before the

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English acts had all, by the 57 Geo. 3, been extended to Ireland. This is a strange construction undoubtedly which we are called upon to adopt, a construction directly in contradiction to the express statements of the Legislature in the 1 & 2 Geo. 4. Now, see what the Legislature has deliberately done by this act of 1 & 2 Geo. 4: it makes certain of the provisions of 7 Will. 3, regulating trials for high treason, applicable to Ireland; certain others it does not make applicable to Ireland. The important provisions that are not made applicable to Ireland by this statute had been made applicable to Ireland before by 5 Geo. 3. Those are, therefore, passed over; and the recital is, that certain provisions do not extend to Ireland. Now, what becomes of the statute of Anne? If the statute of William did not apply to Ireland, it is impossible to contend that the statute of Anne applied to Ireland, because the same reason applies to both. But the Legislature deliberately omitted to make the statute of Anne applicable to Ireland, though it studiously and, according to the argument of the counsel, unnecessarily and absurdly proceeds to make the act of William applicable to Ireland after the passing of 57 Geo. 3. Then there is the 2nd section in that act of 1 & 2 Geo. 4, c. 24, which I think tends very much to fortify the argument on this subject. By that 2nd section the Legislature extends to Ireland, without mentioning the act of 39 & 40 Geo. 3, its provisions with respect to personal treasons against the sovereign; it makes the enactments of 39 & 40 Geo. 3 the law of Ireland, adopting the very words of the act, but studiously omitting the reference which the 39 & 40 Geo. 3 contains to the statutes of William and Anne. Why? Because those were statutes in daily use in England, and because they did not apply to Ireland. Can any reason for this omission be suggested beyond that which I have stated, that the Legislature knew perfectly well that the law regulating the trial of persons for high treason in Ireland was a different law from that regulating the trial of persons for high treason in England; one being regulated by Irish statutes (more applicable perhaps to the state of things in Ireland than the English law), and the other regulating the trials of English treasons. But I would say that an examination of the different sections of 57 Geo. 3 demonstrates that that act of Parliament did not, and could not, extend to Ireland, and never was contemplated as an act extending to Ireland. It must be admitted, to be sure, that Ireland is not expressly excluded from its operation. It is also true that Ireland is not expressly included. We must, therefore, look to the terms, and the subject-matter of the enactments, to judge whether this statute of 57 Geo. 3, or any section of it, included Ireland. My opinion is, that not one single section of it is applicable to Ireland. The 1st section of it does no more than continue and perpetuate a portion of the act of 1796, which recites certain provisions made by that act of Parliament, establishing treasons of a particular character. That was the temporary act of 36 Geo. 3; and then the 57 Geo. 3 goes on to recite that it is necessary and expedient that such of the provisions of the said act as would expire at the end of the next session after the demise of the crown should be further continued and made perpetual. Suppose it had been a continuation for ten years, or for twenty years, would it have been said that by that continuation the acts were made applicable to Ireland? What is the perpetuation of an act but the continuation of it indefinitely—a perpetual continuation of it? It was to be extended in point of time, and in point of time only. It was not to be extended in point of locality. There is no such contemplation or view at all attributable to the Legislature in the terms of this 1st section of the statute. Well, if that be so, it gives us a key to all the rest. What is the 2nd section? The 2nd section is an extension in a different way. The Prince Regent was not included within the terms of the act of 1796, nor would he come within the terms of the perpetuation of it; and, accordingly, the 2nd section extends those provisions to the Prince Regent during his office. That is merely an extension of an English act of Parliament to an individual not comprised within the purview of the temporary act. Then comes the 3rd section—what does it do? Why it extends the provisions of the 39 & 40 Geo. 3, in the same way exactly, so as to include the Prince Regent in their operation during his office as Prince Regent. And what is also remarkable here is, that the very subject of this 3rd section is the subject of that 2nd section of the act 1 & 2 Geo. 4, making the 39 & 40 Geo. 3, applicable to Ireland in the manner I have before adverted to.

Then comes the 4th section, on which I may say that the whole fabric of the argument upon this objection has been based. Now, what is that? To my understanding nothing can be plainer than that it does not go one atom beyond the provisions which have been made the subject of a former section. That 4th section provides that where persons shall be indicted for any offence, made or declared to be high treason by this act, that is, by the 57 Geo. 3, they shall be entitled to the benefit of the act of William, and the act of Anne, except in particular cases. But who are they? Persons accused or indicted on the perpetuated provisions of the statute of 1796, or upon the extension of that and the other statute to the person of the Prince Regent; that is the whole enactment—to them it is extended, and to no others. Now the subsequent sections, the 5th and 6th, the concluding sections of the act, are merely consequential to the sections to which I have before adverted. There is nothing whatever in the act to lead one to the conclusion that Ireland was in the remotest degree in the contemplation of the Legislature. On the contrary, the Legislature knew perfectly well that the law regulating high treason in England was different in several respects from that in Ireland. The 6th section appears to me to have been added *pro majori cautela*. However, it is argued in addition, though I think not so strongly pressed, that the act 11 Vict. c. 12, has extended the acts of William and Anne to Ireland. I own I can see nothing in that statute to lead my mind towards that conclusion. This act, by its 2nd section, has done nothing more than enact that the recited provisions, made perpetual by the 57 Geo. 3, shall extend to, and be in force in, that part of the United Kingdom called Ireland; that is, it has extended, not the act of 57 Geo. 3, to Ireland, but has extended to Ireland certain penal provisions of the act of 1796. That is the whole effect of that section of that act. But an argument is raised on the preamble. The word used is “provisions;” and an argument is raised on that word, which, it is said, extends the 2nd section. I own I cannot see that. I take the preamble to be explained by itself as well as by the 2nd section, so as to prevent the possibility of mistake. It says, “doubts are entertained, whether the provisions so made perpetual”—that is, the provisions of the act of 1796. Who entertained those doubts? I am sure I do not know; but nothing could be more unfounded than those doubts would seem to be. “It is expedient,” they say, “to repeal all such of the provisions made perpetual by the last-recited act as do not relate to offences against the person of the sovereign, and to enact other provisions instead thereof, applicable to all parts of the United Kingdom.” What is the meaning of the word “provisions” here? It is contended by the argument that the word “provisions” is to include all enactments of the statute of the 57 Geo. 3. And then, having extended the use of the word “provisions” in that way in the 1st section, they transfer it to the 2nd section, contrary to the words of the 1st section, which says, that only those portions that were made perpetual shall extend and be in force. But when we look at the recitals in the 1st section, we find the word “provisions” is by the course of the language itself grammatically understood, meant, and intended to apply to the penal provisions of the act of 1796, establishing new treasons, and the penal provisions of the act 57 Geo. 3; but beyond those, the word “provisions,” though in its general sense it may apply to everything done by the act of Parliament—beyond that limit in fair construction it appears impossible to me to press the meaning of the word “provisions,” even in the 1st section. But all that is controlled afterwards by the express terms of the 2nd section of the act. So that upon that part of the subject I do not entertain, indeed I never did entertain, any doubt. But again I would say, if the 4th section of 57 Geo. 3 did include Ireland, or if the present indictment is founded entirely on 25 Edw. 3, no count of the indictment is founded on 57 Geo. 3, or 11 Vict. The very plea of the prisoner in this case shows that to have been the understanding of his own counsel. It is admitted, that the first five counts of the indictment are founded on 25 Edw. 3; and it is in consequence of that admission that his plea applies itself particularly to the 6th count; but I would say, it is clear also that the 6th count is founded on the statute of 25 Edw. 3. It is a count for compassing the death of the Queen; and the overt acts relied upon are, the levying of war, and the conspiring to levy war, against the Queen. It is not a count for compassing personal injury to the Queen. Now, in *Thistlewood's case* (33 State Trials),

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one of the counts is a count almost in the terms of the present count—a count for compassing the death of the king through the medium of war to be levied; and I observe that the Attorney-General and the counsel for the prisoner both agree in considering that count to be a count founded on 25 Edw. 3. And what says Lord Chief Justice Abbott in his summing up on this subject?—“Two of these charges, namely, the compassing and imagining the death of His Majesty”—in almost the very terms of the count now before us,—“and the actually levying war against him, were declared to be treasons by a statute passed as long ago as the reign of Edw. III.” Therefore, it appears to me plainly, that the 6th count in this indictment is a count founded on the statute of 25 Edw. 3; and, therefore, the prisoner’s counsel have no right, even upon their own argument, to invoke the aid of the English acts, because their argument must be founded upon the supposition that there is a count in the indictment which is founded upon those subsequent acts. But it has been argued, that unless the 57 Geo. 3, or the 11 Vict. be held to embrace Ireland, no provision is made for the regulation of treason trials founded on the 11 Vict. There certainly is none made by the terms of the late statute. Let us suppose this to be true in point of fact, it does certainly show on the argument a *casus omissus* by the Legislature. But what would the construction of the plaintiffs in error amount to? Why it would show an extraordinary inconsistency in the modes of proceeding according to the enactment of the Legislature with respect to treason trials in Ireland, for there would be one act of Parliament, or set of acts, regulating trials for treason on the 25 Edw. 3, namely, the Irish acts; and, according to the same argument, in all trials for treason upon indictments to be founded upon the latter acts, the proceedings would be regulated by the English acts of Parliament. Could anything be more monstrous and absurd than that proposition? Surely that consequence would lead to greater absurdity and difficulty than the mere circumstance of there being a case occurring in Ireland in which there was no provision made in the way of privilege, with respect to having a copy of the indictment. Now I have already intimated my own view, that the early Irish act in its reason, though not in its terms, is sufficiently comprehensive to apply to all cases of treason in Ireland, whether future or then existing. But it is not necessary that I should dwell on such a topic as that. We must interpret the acts of Parliament as we find them; we are not at liberty to remodel them. But I would give a liberal construction to that act of 5 Geo. 3, and make it applicable to all treasons, rather than leave a *casus omissus* on the subject; that is my own impression. Another mischief which has been suggested as arising from the extension of 57 Geo. 3 to Ireland, was, that the sentence on a prisoner convicted under the new statutes would be unprovided for, and that the common law barbarous sentence must be put in execution against the prisoners. But I own I am not struck by that argument at all, because I feel quite satisfied that the terms of 54 Geo. 3 are sufficiently ample and comprehensive to apply to all cases of pronouncing sentence in high treason. There remains only a word upon the form of the plea. I shall not dwell upon it. The facts have been brought before the court; they are upon the record. I cannot shut my eyes to the statement, and I think it much more expedient to decide upon the merits than upon the question, whether such a plea is admissible or not. But I own my own impression would be to refuse to receive such a plea. The matter of it appears to me to be matter of regulation and of discretion, and to be disposed of upon motion, and not by way of plea to the indictment. I am not as sentimental, perhaps, as some of the learned counsel who argued this case, upon the subject of allowing the exercise of discretion to judges. The abuse of discretion is greatly to be deprecated; but the use of discretion in many cases affecting life, liberty and property, is necessary according to the law of the land. The courts of justice are obliged to exercise discretion in civil cases; but above all, in criminal cases especially, they are compelled to exercise a discretion very painfully sometimes, but necessarily. Why is it that a bill of exceptions is not allowed in criminal cases? Why is it that a writ of error is not permitted without the allowance of the Attorney-General, although a bill of exceptions and a writ of error are the right of the subject in civil cases? Why, only because it is deemed better, in such cases, to trust to the discretion of the judge than to interpose delays which might be dangerous to the administration of justice. There are two principles of law upon this

subject which may sometimes conflict, or appear to do so. The one principle is, that there should be every opportunity given for deliberation, and for correction, before a sentence is carried into execution; that is one principle. The other principle is, that it is expedient for public purposes, especially in criminal cases, that execution should not be delayed, or the sentence, whatever it may be, unnecessarily deferred. It is for such reasons as these that the law of England does not allow a bill of exceptions in criminal cases and does not allow a writ of error except *sub modo* as I before stated. I am, therefore, certainly not alarmed at this doctrine of discretion, temperately and properly used, as it ought to be according to adjudged cases, and according to law; and I think such pleas as tend only to delay or to defeat justice should not be encouraged. My opinion upon the whole of this case is, that all the objections should be overruled, and the judgment of the court below affirmed.

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PERRIN, J.—I shall not find it necessary to go through the several matters assigned as errors, but shall confine the few observations which I think it necessary to make to three of the matters assigned as errors. The first is, the objection to the caption. It appears to me that the caption does show that the indictment was taken at a special sessions of oyer and terminer and gaol delivery at Clonmel in Tipperary, held in and for that county, before my Lord Chief Justice, the Lord Chief Justice of the Common Pleas, and Mr. Justice Moore, who were justices and commissioners of oyer and terminer within the said county, appointed and nominated to inquire, hear and determine by a commission under the great seal, dated the 1st of September (to them and others directed), by the grand jury of that county, and therefore before a court having jurisdiction. I think it is clearly expressed, that they are appointed and nominated to inquire, hear and determine; that the commission is directed to them and others does not detract from, impair, or deny the authority there expressly stated to do so. This is the case of every commission at the assizes, in every county at large in Ireland, directed to all the judges, but executed by one or more. There has been no authority cited which shows that the caption in this form is bad. We are called upon to assume, that that caption and statement is not merely insufficient, but really that it is untrue, and that my Lord Chief Justice of this court, and the Lord Chief Justice of the Common Pleas, and my brother Moore, sat there without any authority; and we are called upon to reverse the judgment upon that ground—two of my brothers, my Lord Chief Justice and Mr. Justice Moore, sitting here, in this court, to reverse their judgment, on the ground that they had not jurisdiction, when they acted by and under the terms of a commission in their custody and care, which this caption pursues exactly and precisely. My Lord Chief Justice has produced and shown to us here the commission, which accords in terms with the caption, and which is in the ordinary form of all our commissions, jointly and severally directed. I think it unnecessary to say anything more on that point. My Lord Chief Justice, if this was not in his own court, might have had the commission produced here by *certiorari*. I think the arguments that have been so strongly put on the point, show that the caption must be so understood; but on a question of this importance, it is a great deal better to show that there is no ground of objection, than that the argument in answer to it is sufficient. The next objection in the case is the extraordinary one, that the five counts are insufficient in law, inasmuch as the levying of war against the Queen is not treason in Ireland. It seems to me, if anything can be deemed extraordinary now-a-days, very extraordinary to state such a proposition in Her Majesty's Court of Queen's Bench in Ireland. The second proposition on the same point is, that Tipperary is not shown to be in Ireland, that is, within the realm of Ireland. I shall only read the act of Parliament which has been already referred to, 5 Geo. 3, c. 21, "An Act for the better regulating the Trials in cases of High Treason, under the Statute of the 25 Edw. 3," an act of the Irish Legislature. "Whereas it is highly reasonable and agreeable to the nature of our excellent constitution, that persons prosecuted for high treason under stat. 25 Edw. 3, should be allowed all proper means for defence of their innocence; in order thereto and for the better regulating of the trials of all such persons, be it enacted by the king's most excellent Majesty, by and with the consent of Parliament, from and after"—such a day—"all and every person and persons who shall be accused and indicted"—that is in Ireland—"for high treason under that statute, shall have a true copy

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of the indictment delivered to them." They say that that act, 25 Edw. 3, was not in force in Ireland. I cannot answer that argument, if any one can reconcile it with the provisions of the statute. But, further, there is the passage in Coke Littleton, already referred to by my Lord Chief Justice, and the judgment of Lord Clonmel in 25 St. Tr. on the trial of William Jackson. My Lord Clonmel, in his summing up to the jury, says, "Gentlemen of the jury, in this case of *The King against William Jackson, clerk*, the indictment against the prisoner is founded on the statute of treason, 25 Edw. 3, c. 2—a statute that has been considered as one of the greatest protections to the subject that ever passed, as stating and precisely ascertaining what shall be treason to affect the life of the subject, to prevent any unascertained crime of that nature from affecting him." And the counsel in that case for Mr. Jackson were Mr. Curran, since Master of the Rolls, and Mr. George Ponsonby, since Lord High Chancellor of Ireland; and they, notwithstanding that act was not in force in Ireland, seem to have made no objection to the summing up of Lord Clonmel on the subject. The counsel for the prosecution, Lord Kilwarden, commenced his address by saying, "The court will inform you, gentlemen of the jury, that this indictment is grounded on the stat. 25 Edw. 3, by which"—and so forth. And then, in course of the argument, Mr. Ponsonby regrets that the law does not give two witnesses in Ireland, as in England, but makes no suggestion that 25 Geo. 3 was not in force here. In *Weldon's case* (2 St. Tr. 278), the same doctrine is laid down by Mr. Justice Chamberlain; and in *Heneage's case*, 1123; and in *Sheares's case*, by my Lord Carleton (27 St. Tr.); and the counsel for the Sheares were Lord Plunket and Mr. Curran. Then in 28 St. Tr. Lord Downes, in his charge to the grand jury, in the year 1803, says, "It is probable, gentlemen, that indictments for high treason may be sent up to you against some of the prisoners in custody, grounded on stat. 25 Edw. 3, upon which the law of treason in this country rests." I am, therefore, of opinion that the error so assigned is unfounded, and that it is illegal and contrary to that statute to levy war against the Queen in Ireland. The next question to which I shall advert, the most important in the case, and one upon which I must confess I have had a good deal of difficulty, is, the important question whether or not the statute of Anne is in force in Ireland? or, in other words, whether the 57 Geo. 3 extended all the provisions of the 36 Geo. 3 to Ireland, including the provisions of the statute of Anne; and if not, whether the 11th of Victoria does? In considering this question it may be useful to bear in mind the state of the statute law of treason in the two then separate kingdoms of England and Ireland. At and after 36 Geo. 3, and up to 1800, the common law of the countries is the same. In England there was the 25 Edw. 3 declaring and defining treason, I mean at the time of the passing of 36 Geo. 3. There was also the 7 Will. 3, regulating the trial, giving a copy of the indictment five days before trial; giving the assistance of counsel; requiring proof by two witnesses, and limiting prosecutions to three years. There was the 7th of Anne, giving the prisoner a list of the witnesses to be produced for the prosecution, of the names and additions of the jurors, and a copy of the indictment ten days before the trial. There was another distinction and difference which has been observed on; that is, the right of peremptory challenge in England was thirty-five, while the right in Ireland was twenty only, by 10 & 11 Car. 1. In Ireland the law stood thus: there was the 25 Edw. 3 in force by the operation of the 10 Hen. 7; and there was the 5 Geo. 3, which I have already adverted to, giving a copy of the indictment in treason, under the 25 Edw. 3, being the only statute then in force in Ireland, five days before trial, and the assistance of counsel, and no more. So that at that time, at the time of the passing of the 36 Geo. 3, by the law of England, the party accused was subject to the same statutable enactments as to the nature and extent of the crime; but he had, in addition to what was given by 5 Geo. 3, namely, the copy of the indictment five days, and the assistance of counsel, the protection of the other sections of 7 Will. 3, requiring proof by two witnesses, and limiting the time of prosecution. Further, he had the provisions of 7 Anne, giving a list of the witnesses to be produced for the prosecution, and the names and additions of the jurors, and the copy of the indictment ten days before the trial. In that state of the law it was deemed requisite in England to pass the act of 36 Geo. 3, which act declared

old, and enacted fresh treasons, and defined and pointed out with precision several fresh treasons, but many of them such as had been by judicial decision held to be provable under, and establishing the treasons declared by, the statute of Edw. 3. And it enacted, that persons prosecuted for any offence under it should have the benefit of 7 Will. 3 and 7 Anne; and it made that act to continue during the life of His Majesty King George III., and until the end of the next session of Parliament after his demise. That act created and declared additional treasons to those previously existing in England under the statute of Edw. 3; and in fact it added some, such as compassing injury to the person, which might not have been held to have been proofs of existing treasons, but it, generally speaking, did define and give precision to the charge; and then it added to the enactments of its 1st section those I believe of the 4th, namely, that persons brought to trial for those treasons should have the benefit and advantage of the existing law of England upon their trial. The act, as has been properly observed, grew out of the state trials in England of 1793 and 1794; and following up the views then taken, in order to give the parties brought to trial the advantage and benefit of a more precise and exact charge, it could not intend to take away, but provided that they should have, the benefit and advantages which they would otherwise have had by a direct prosecution under the statute of Edw. 3, namely, the advantages and provisions of those two acts of William and Anne. So the law stood while the two countries were separate. The 25 Edw. 3 and 36 Geo. 3 defined treason in England. The 7 Will. 3 and 7 Anne regulated the trials, and gave the copy of indictments and list of witnesses. The 25 Edw. 3 defined treason in Ireland; and 5 Geo. 3 gave a copy of the indictment and the assistance of counsel. The law so remaining without any alteration in these, or in any material respect, till 1814, an act was passed altering the sentence to be pronounced in cases of treason—an act which, in my understanding, was not confined to treason under any particular statute, but meant to apply to all the cases where the old and barbarous sentence was to have been pronounced, and substituted the other in its place. That is the plain, and, I think, distinct meaning of that act of Parliament; and I cannot understand why the provision at the end of the 57 Geo. 3 was added. But then in 1817 His Majesty King George III., though still alive, being infirm, and certain outrages having been committed against the Regent, the 57 Geo. 3 was passed: the law of treason in Ireland at that time being regulated and defined by 25 Edw. 3 and 5 Geo. 3; neither 7 Will. 3, 7 Anne, nor 36 Geo. 3, being of any force in Ireland. The 57th enacts, not that all the provisions of 36 Geo. 3, thereby and therein recited, but that those of the provisions (for it is only certain of them) thereby and therein recited which relate to the heirs and successors of George III., shall be and the same are thereby made perpetual. No words of extension, nor, as has been already observed by my Lord Chief Justice, and I think a very important observation, no operation given to it by this 57 Geo. 3, in any respect until after the demise of George III., makes the compassing of the death of the Regent, or direct attempts on life or person, treason, within the realm or without, on proof of two witnesses; it extends the provisions of 39 & 40 Geo. 3, English, to any case of compassing the death of the Regent, where the overt act is assassination, or direct attempt on life or person. It then provides that persons prosecuted under it shall be entitled to the benefit of 7 Will. 3 and 7 Anne, except where assassination shall be the overt act. It is material to advert to the terms adopted in that act. It did not perpetuate the act of 36 Geo. 3. It is intitled "An Act to make perpetual certain Parts of the 36th of the King; and for the Safety and Preservation of the Person of His Royal Highness the Prince Regent;" and it recites that by that act it was amongst other things enacted "that whosoever after the passing of the act during the natural life of His Majesty, and until the end of the next session after the demise of the crown, within the realm or without, shall compass the death or destruction of the king, or his heirs or successors"—and then there are matters which I need not take up time by reading—"and being lawfully convicted thereof by due course of law, upon the oaths of two lawful and credible witnesses, shall be deemed and adjudged a traitor: and whereas it is necessary and expedient that such of the provisions of the said act as would expire at the end of the next session, should be further continued"—should be continued longer. This was passed in the

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57th, when the king was infirm, and after the regency had been some time in continuation. It recites that it is expedient that such of the provisions as would expire at the demise of the crown should be further continued; that is, provisions that were in force under the 36 Geo. 3, and would be in force under the 36 Geo. 3, were to be further continued; and it then proceeds that all and every, not of the provisions of the act, but of the hereinbefore-recited provisions, it having enumerated merely the penal parts of the statute, which relate to the heirs and successors of His Majesty and the sovereign of these realms, shall be, and the same are hereby made perpetual. And it may be worth while, where we have had so much discussion with respect to the word "realm," and the decision to be adopted with respect to it, to observe how the word is used here. In the 36th it is "within the realm" when reciting it; and then when the clause is stated with respect to the Regent, the 2nd clause of the act, it is "Whereas in consequence of daring outrages offered to the person of His Royal Highness, in the exercise of the royal power and authority to the crown of these realms belonging." And then it goes on in the enacting part, and it enacts that any one who shall compass injury to the prince, in the same terms that have been applied to the king in the 36th, within the realm or without, shall so and so. Now it seems to me upon those expressions which I have drawn attention to, to state, that it is expedient that such of the provisions as would expire at the next session should be further continued; and, in order to be further continued, they must have had previous existence; and if you continue that which had previous existence, that not relating to Ireland, it is hard to say that the continuation of that makes what before did not extend to Ireland, to extend to Ireland; the enactment is this:—"be it enacted, that all the hereinbefore-recited provisions which relate to the heirs and successors shall be made perpetual." The enactment which the learned counsel call on the court to read is this, be it enacted, that all the provisions which relate to the heirs and successors shall relate and extend to Ireland, and be made perpetual. I cannot see any ground of construction, or any expression of intention to be carried out, which would either oblige or authorize us to interpolate these words. It does not profess to extend the statute to Ireland; that is not its object nor its title. I may as well allude to it here as hereafter: it is observed that the 2nd section must include Ireland, because that is to make it treason to compass the death of the Regent, and there is no reason why that should not be punishable in Ireland as well as in England. There was certainly no reason why a law might not be made for that purpose to operate in Ireland as well as in England; but the question is, whether this does so, and expresses it. It recites the outrages, and then it says, it is expedient to extend the provisions of the 36th to the Regent. It is argued that it is absurd to say that that should not extend to Ireland, and that the law which was then passed for the protection of the Regent should not refer to Ireland. It is to be remembered that at the very time when this is supposed to have been so intended, the person of His Majesty George III. was left without the protection of an act, either of the 36th or the 57th, because all that is perpetuated is the clause which related to the successors, which is not to take effect, and could not take effect, till after the demise of the crown; and therefore it shows the danger of arguing upon our notions of what is politic or proper, instead of confining ourselves to the exposition of the statute laid down, or as it is passed. This I consider to be the cardinal part of the case, because if the 57th did extend the 36th and all its provisions in terms to Ireland, it would follow, in my mind, that the provisions of the statute of Anne were in force in Ireland; and therefore I must take a little more time on this part of the case. The 57th recited the act of 36 Geo. 3, which act had been made about twenty-one years before for the realm of Great Britain, making some, and certainly declaring other treasons. The act had been made before the Union for the life of Geo. III. and for a session beyond his demise, for Great Britain. The 36 Geo. 3 manifestly did not and could not relate to or affect Ireland. It was not deemed necessary or expedient by either the British or Irish Parliaments to extend that act to Ireland before the Union, nor in terms was it done after. But as the demise of Geo. III. appeared to be impending, he being then in a very infirm state of health, and as also personal outrages had been offered to the Prince Regent, it was deemed necessary to pass an act of Parliament for the purpose of his protection; it was deemed necessary and expe-

it that such of the provisions of the 36 Geo. 3, as would expire at the end of the session after the demise of His Majesty should be further continued made perpetual. And it is enacted, that those provisions which relate to heirs and successors of George III., sovereign of these realms, shall be and hereby made perpetual. The preamble expresses the expediency of further continuation of certain of the provisions; and it is very material, in considering the effect of the 57 Geo. 3 and the 11 Vict., to bear this in mind, that it is in either case a perpetuation of the act of Parliament, but of certain portions of the act. The preamble expresses the expediency of the perpetuation continuing further of certain provisions, but it is silent as to extending them to Ireland; and the other provisions for the safety and protection of the sovereign not in terms extended to Ireland, nor by any implication can be said to extend to Ireland during the life of His Majesty George III. So that the language of the statute expresses no intent to change the law of Ireland, but merely to continue further the provisions of the 36 Geo. 3, as if the original act had been made perpetual. If it had been made perpetual, it is argued, that upon it no question would arise here—nothing to denote intention to make a new law, or to extend the provisions, not merely in point of time, but to another realm; none to extend it from the period of the passing of the act, but from and after the demise of Geo. III. The continuation of the act, in point of duration of a law, relating to one portion of the realm, in general terms not denoting an intention to assimilate or extend throughout, never, that I can ascertain or find, been considered to render the law perpetual in its operation. I do not mean to say that it is necessary that there should be express words to denote such an intention. I admit, and think, it may be implied from the provisions of the act of Parliament itself, in the same manner as such presumption or implication may be rebutted by the language or provisions of the act itself, or by its repugnancy or inconsistency with the existing laws of the one country or of the other. Here the construction that would be put upon the Parliament to make a law regulating the offence and trial of treason in England from its passing, but to apply to Ireland not until after the demise of the King, and to except him, for that must be the effect, it must be an intentional exception of His Majesty, from the protection of the law which would not take effect until after his demise; to introduce such a change in the law of treason, and the important regulations for the trial of persons accused, and the protection of those innocently accused, without one word to denote such intention, or without one word of expression of its expediency; but finding the chasm in legislation, to which my Lord Chief Justice has adverted, the lifetime of His Majesty, the statute in fact says, that certain provisions should expire at the end of the session which ought not to be allowed then to expire, but ought to be further continued; that is, have a longer and perpetual continuation. That denotes the intention to continue their operation, but not to extend or to apply it to cases, or to a realm, which it did not embrace; and the effect of which, both as to the offence itself and as to the proof of guilt, and as to the forms of procedure, and the privileges, enactments, and provisions made for the protection of those accused, in order to insure them a full and just trial, is a variant one from the other, in matters of the utmost importance and consequence. It therefore appears to continue, properly speaking, in England or at Britain a law which had been for a considerable period—twenty-one years—in force there, and laws which had been more than a century in force, regulating the mode of trial and proceedings in treason. But it says no more. It appears to me that such a legislation is not to be presumed. Not only does Parliament not expressly declare the intention to introduce and make so important a change in the law, either in recital, preamble, or enactment, but its recitals, preambles, and enactments being all particular, and pointing merely to extension of duration, appear to me to imply the absence of any such inference or intention. And after that act had been passed, which is supposed to have extended all the provisions of the statute of William, and all the provisions of the statute of Anne, to Ireland, early in the second year after the demise of His Majesty, within three or four years after the passing of the act; after this which is supposed to have introduced a new code of treasons into Ireland, when they would have come into operation in Ireland, an act is passed to

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extend sect. 4 of the 7 & 8 Will. 3 into Ireland. Sect. 1 had been in force under 5 Geo. 3; and this 1 & 2 Geo. 4 recites the other sections of William, sets them out at length, intending to introduce them, and make them the law of Ireland. Not having been previously to be found upon the statute-book of Ireland, it does not say that the provisions of William should be extended to Ireland, or that the persons tried should have the benefit of the provisions of Anne, or the provisions of William, as was very proper legislation in England, where those enactments and provisions were already on the statute-book, and were merely extended to other cases; but it sets out and recites those provisions which it intends to make law in Ireland, and it recites that those enactments and provisions do not extend to Ireland. Within two or three years after the act was passed which is supposed to have put both acts into operation to the extent of the great body of treasons recited in those acts; this stat. 1 & 2 Geo. 4, recites, that these sections do not extend to Ireland, stating that absolutely and unqualifiedly, not that they do not extend, or may not extend to certain cases, but that they do not extend to Ireland; and further, that it is expedient, just, and reasonable that they should be extended to that part of the realm. It then enacts that they shall extend to, and be in force to all intents and purposes whatsoever in Ireland. It does seem to me very difficult, therefore, to reconcile that statute with the notion, that the 57 Geo. 3 had made all the provisions of the 36 Geo. 3 law in Ireland. And the same act, as my Lord Chief Justice has already observed, provides, in cases of compassing the death of the King, the party shall not have the protection where the overt act is assassination, or a direct attempt on the life of the sovereign. Here is an express and absolute declaration, that these enactments do not extend to Ireland, and which declares that expressly and unqualifiedly, which would be extremely inaccurate if they did extend, and were in force in respect of the various treasons and classes of treasons made perpetual by 57 Geo. 3, comprising, as I have already mentioned, the most important of the statute of Edward. Not only is there that repugnancy, but it is extraordinary that they should give these minor and curtailed privileges and advantages, if, previously, the statute of Anne had been in force; which gave the copy of the indictment ten days before, and the important advantage of having the list of witnesses and the list of jurors. It is material to consider how the 57 Geo. 3 is supposed to extend all those to Ireland; that persons prosecuted for the offence under the 57 Geo. 3 should be entitled to the benefit of the 7 & 8 Will. 3, and the provisions of the statute of Anne. Without saying more, and without doing as was done in the 1 & 2 Geo. 4, and in the 57 Geo. 3, reciting or noticing the provisions which are to become law in the country, and which does not appear on the statute-book that they were: that provisions and law should be in force in Ireland, not to be found in any statute of the Irish or the united Legislature, contrasted with the provisions and form of the 1 & 2 Geo. 4, its recitals and enactments, which are transferred, enacted, and extended to Ireland, appear to me to bear very decidedly upon this question, and to show that the 1 & 2 Geo. 4 is inconsistent with the supposition, that the statutes of William and Anne have been, and were, to such an extent actually in force in Ireland; or in other terms, that the 57 Geo. 3 had extended the provisions of the 36 Geo. 3 to Ireland. It has been pressed, and strongly, that it is inconvenient, and may be impolitic, and not consistent with correct legislation, that what is deemed proper for the just defence of innocence in one country is not deemed so for the other; and also, that some of the statutes are framed and drawn with a laxity which raises questions. We must deplore, but we cannot remove it; we cannot legislate; we are only to read, pronounce, and expound. We are not to presume or imply any new provisions, enactments, or extensions beyond the plain explicit expression or necessary implication. We cannot even assume that general words include Ireland, where not excepted. There are numberless instances to the contrary—numberless instances of acts passed altering acts of Parliament in England, and upon most serious subjects, and afterwards acts passed making the same alteration in Irish acts; of course, expressing the opinion of the Legislature, that the former act did not, in consequence of being passed by the united Legislature, extend the English act to Ireland. Now, then, comes the question, and which I think the most difficult question in the case, whether the words of the 11 Vict. do not go

further, and do not extend the provisions of those statutes to Ireland; that act recites, that whereas by an act of the 36th, it was amongst other things enacted, that if any person during the natural life of the king, and so forth, shall compass the death and destruction, &c., and such compassing shall express, and, being convicted, shall be a traitor. And then it recites, that whereas by an act passed in the 57th, all the hereinbefore recited provisions—and it is very remarkable to notice the caution observed both in the 57th and in this act; it is not that the said act was made perpetual, but it is that “all the hereinbefore recited provisions of the act of the 36th of the King were made perpetual.” And then it recites, that “Whereas doubts are entertained whether the provisions made perpetual are extended to Ireland.” As has been already observed by my brother Crampton, we never heard of any doubt raised in any court in Ireland upon the subject. No question was ever suggested, nor was it ever alleged in any court or case in Ireland, that by the 57 Geo. 3 had been imported all that extensive class of treasons into Ireland, and that that had been the law up to the passing of 11 Vict. And then it says, “Whereas it is expedient to repeal all such of the provisions made perpetual by the last recited act as do not relate to offences against the person of the sovereign, and to enact other provisions instead thereof, applicable to all parts of the United Kingdom, and to extend to Ireland such of the provisions of the said acts as are not hereby repealed.” Now, I had a good deal of difficulty on that point; because I think if the enactment had followed that recital, whatever we might have guessed as to the intention of the Legislature, that expression would have included all the provisions of the acts. Then, “to extend to Ireland such of the provisions of the said acts as are not hereby repealed.” Now “the provisions” must be taken to be “enactments,” and “the enactments of the said acts as are not hereby repealed,” would leave all the 36 Geo. 3, which was not expressly repealed here. But then the enactment goes on—“be it therefore enacted, that certain provisions shall be repealed, and be it declared and enacted, that such of the said recited provisions made perpetual by the 57th shall extend to, and be in force in, Ireland.” So that it plainly confines the effect of that 2nd section to such of those recited provisions; the thereinbefore recited provisions as were not repealed, but made perpetual; they and they only are extended to and are in force in Ireland, confining the effect of this enactment to the 2nd section; for I think it must be taken to be an enactment and not a declaration. It would be exceedingly imperfect legislation and expression, if it were a “declaration,” to select portions of an act thirty years old and say they shall “extend to Ireland.” The true construction is, an enactment that such of the thereinbefore recited provisions made perpetual by the 57th, shall extend to, and be in force in, Ireland. There is no more in this act than in the 57th, and the observations I have made I shall not repeat with respect to it, but they apply equally to this act as to any implication that can be drawn from it. There is no intention expressed or shown to alter the law of Ireland as to the regulation or proceedings in trials for treason. There is no provision, such as is made in the 57th and 36th Geo. 3, that the person indicted should have the benefit of the 7 William and 7 Anne. And it is certainly remarkable, that when the Legislature were passing acts, making fresh treasons in England, they thought it necessary to add a distinct and express enactment, in a separate section, giving the benefit of those two recited acts to the person tried under this: and they also thought the same in the 57th, where they were perpetuating the 36th, and where they were enacting new treasons affecting the person of the Prince Regent. In those cases the Legislature proceeds so cautiously in laying down those provisions, and yet we are called upon to infer and imply contrary to and against the difficulty which I have suggested, and which I feel to exist, that, without any expression of such intention, those penalties are to be transferred, not merely from one offence to another, in a country where they existed as the laws and regulations of treason, but to extend to another country in which the laws were altogether different. It is inconvenient certainly; this legislation upon which I have been observing, and it does occasion a good deal of difficulty—it has created a good deal of difficulty in my mind; but I have, upon the best consideration I have been able to give the case, come to the conclusion that 11 Vict. does not transfer the provisions of 36 Geo. 3, nor transfer the provisions of the statute of Anne, either by direct legislation, or by

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introducing either the 57th or the 36th Geo. 3. It is to be regretted that this short mode of expression, which raises such difficulty, should have been adopted; but our duty is not to correct the Legislature; our duty is to form the best opinion we can on what the meaning of the statute is which has been passed. We may regret the form, and we may regret that there should be such a variation in the laws of the two countries. We may deplore it, and I do think it is deplorable, that there should not be distinct and precise legislation, and that what is deemed conducive to the establishment of innocence in the one country should not be deemed so in the other; but, as I before mentioned, all we have to do is to expound the law: we cannot make it. If there be no doubt, or no ground of implication we cannot depart from the enactments. The conclusion which I have come to upon this subject is, that the statute of Anne is not in force in Ireland, and therefore there was no foundation for the error assigned in this respect. I shall not go into any further consideration of it; it is not necessary for me to do so, either as to the form or the admissibility of such a mode of bringing forward such a matter, if in point of law the right existed. It is clear, that under the statute of Car. 1, the right to challenge was limited in high and petit treason to twenty instead of thirty-five. It is also plain, that the word "treason" is used in 9 Geo. 3, as a single general term, substituted for the two that had been used, "high treason" and "petit treason," in 11 Car. In this very act we find the word "treason" used necessarily to include or mean high treason; there can be no question on that. And with respect to the *allocutus*, I think it has been sufficiently observed upon. Therefore I am of opinion that all the errors assigned ought to be overruled.

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MOORE, J., expressed his full concurrence in the opinion pronounced by the other judges, and in the reasons which had been assigned for that opinion, observing that "it is totally beyond my power to do anything more than to repeat some of the observations which have been already so clearly and strongly made by some one or other of my brethren who have preceded me." (a)

The Attorney-General (Monahan), The Solicitor-General (Hatchell), Baldwin, Q. C., David Lynch, and John Perrin, for the Crown.

Whiteside, Q. C., Butt, Q. C., Napier, Q. C., Francis A. Fitzgerald, Isaac S. O'Callaghan, Sir Colman O'Loughlen, and Thomas H. Barton, for the several plaintiffs in error.

ERRATUM.—In the report of this case, in page 361, *supra*, in line 23 from bottom, for "in the month of October, 1848," read "in the months of September and October, 1848."

(a) For this reason we have deemed it unnecessary to give this judgment in *extenso*, the case having already occupied more pages than had been anticipated, and which only its great importance as the principal state trial of our time will excuse.—EDITOR.

CENTRAL CRIMINAL COURT.

MAY SESSION.

May 11, 1849.

REG. v. M'CLARENS, MIDDLETON, JOHN DRADDY and
ANN DRADDY. (a)

Receiving stolen property—Wife acting under coercion of husband.

Where a wife was indicted with her husband for receiving stolen property, and the evidence was, that although not present when her husband received the property, she had subsequently dealt with it, and ultimately destroyed it:

Held, that it was a question for the jury whether, in receiving it and taking an active part in dealing with it afterwards, she did so with the purpose of aiding her husband in the object he had in view of turning it to profit; or whether what she did was merely for the purpose of concealing her husband's guilt, or screening him from the consequences. In the first case she might be found guilty; in the second she ought to be acquitted.

THE prisoners, M'Clarens and Middleton, were indicted for stealing certain sugar, and John Draddy, and Ann Draddy his wife, were indicted for receiving the same, knowing it to have been stolen.

The evidence against the husband was, that he received the sugar in the first instance, his wife not being present; but a witness was called, who, on going to the house to search for the stolen property, found some remains of the sugar in a sink in the kitchen, and on questioning the wife, she stated that she and her daughter had washed all the sugar away; that they had burnt the bags in which it was contained, and that she thought it a hard case that she and her husband should be at a loss of 4*l.* or 5*l.*

Parnell, for the prisoner, Ann Draddy, submitted that there was no case against her; that she was not present at the time the property was received, and that in anything she afterwards did she might be well taken to have acted under the coercion of her husband. Her conduct was much more indicative of an attempt to screen her husband than of any felonious knowledge of the property being stolen. He quoted *Archer's case* (1 M. C. C. 143).

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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COLTMAN, J. (in summing up.)—If the husband received the property knowing it to be stolen, and if the wife received it from him with the like knowledge, and with the purpose of aiding and assisting him in the object which he had in view in receiving it, by turning it to pecuniary profit, or other like manner, although *primâ facie* she might be supposed to be acting under the coercion of her husband that is rebutted by the active part she took in the matter, with the intent above mentioned. But if the part she took was merely for the purpose of concealing her husband's guilt, and of screening him from the consequences, then I think she ought to be acquitted. A wife cannot be convicted of harbouring her husband, where he has committed a felony; and the mere circumstance of her attempting to conceal what may lead to his detection appears to come within the same principle.

The prisoner, Ann Draddy, was acquitted.

Kenealey and *Coles*, for the prosecution.

Metcalf, for M'Clarens.

Woollett, for Middleton.

Ballantine, for John Draddy.

Parnell, for Ann Draddy.

COURT OF QUEEN'S BENCH.

February 10, 1849.

(Before LORD DENMAN, C. J., PATTESON, J., COLERIDGE, J.,
and ERLE, J.)

REG. v. BUCHANAN. (a)

*Attorney—Indictment for practising contrary to the 6 & 7 Vict. c. 73—
Prosecution by a Law Society—Costs—Statute 5 & 6 Will. & M.
c. 11, s. 3—Party grieved.*

*A society composed exclusively of attorneys practising in the county of K.,
prosecuted the clerk of a board of guardians, who, without being quali-
fied as an attorney, conducted an appeal to the Quarter Sessions of
the county of K., on behalf and at the request of the guardians.*

*Held, (Coleridge, J. dissentiente,) that the society was a "party grieved"
within the 5 & 6 Will. & M. c. 11, s. 13.*

A RULE nisi had been obtained for setting aside the side-bar rule for taxing the prosecutors their costs in this indictment, which had been preferred by the Kent Law Society, composed exclusively of attorneys practising in the county of Kent, and on which the defendant, at whose instance it had been removed into this court from the sessions, had been convicted of having practised as an attorney at the Canterbury Sessions, without being duly qualified. The rule had been obtained on the ground that the prosecutors were not parties injured or grieved within the meaning of the act.

The affidavits in support of the rule, showed that the defendant was clerk to the board of guardians; that he had only practised on the particular occasion which gave rise to the prosecution, and then at the special request of the guardians to save expense; and that at the time he was totally ignorant of the recent statute 6 & 7 Vict. c. 73, s. 2, which made such a proceeding on his part penal. The affidavits in opposition to the rule set forth the duties, responsibilities, exclusive privileges, and fixed charges of which attorneys are the subject.

Against the rule cause was shown May 31, 1847, by

Sir F. Thesiger, and Hurlstone. — It is admitted that these prosecutors are not parties injured, for they have not sustained any specific damage. But they are parties grieved. Their case is like that of commoners, whose right has been usurped

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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by a stranger, or of the dippers of Tunbridge Wells, who were held capable of maintaining an action against a stranger who intruded on them, and so interfered with the contingent gratuities of visitors at the wells. It is quite plain that they are persons whose grievance is, from the act of the defendant, distinct from the grievance of the public in general. They cited *R. v. Cooke* (1 Man. & R. 526); *R. v. Taunton, St. Mary's* (3 M. & S. 465); *R. v. Pemberton* (2 Burr. 1035); *R. v. Dewsnap* (16 East, 194); *R. v. Incledon* (1 M. & S. 268); *R. v. Dobson* (15 L. J. 97).

Horn and Pashley, contra.—No person is a party grieved within the meaning of this statute, unless the grievance of which he complains is one for which he could have brought an action; and it is admitted that in this case no action lies. If there be either the specific private damage that would support an action for nuisance, or its equivalent in any other form of injury, the action may be supported; not otherwise. If the injury be one affecting a large class, as in this case, for the attorneys of a county distant from Canterbury, are as much aggrieved by the invasion of this possibility as those of Kent, there is no grievance within this statute. *R. v. Caldecott* (1 Dowl. N. S. 556); *R. v. Edwards* (5 B. & Ad. 407, n.); *R. v. Dewhurst* (5 B. & Ad. 405); *R. v. Middlesex* (3 B. & Ad. 938); *R. v. Thompkins* (2 B. & Ad. 287); *R. v. Sharpness* (2 T. R. 47); *Paine v. Partrick* (Carth. 194); *Chichester v. Lettbridge* (Willes, 74, n); *Williams' case* (5 Rep. 72); *R. v. Lord Waldegrave* (2 Q. B. 341.)

Cur. adv. vult.

Feb. 10.

The judgment of the court was now delivered by

LORD DENMAN, C. J.—This case was heard before my brothers Patteson, Coleridge, and Erle, and myself, and we have been called upon for our judgment. The majority of us think that the prosecutors in this case are parties grieved, within the meaning of the 5 & 6 W. & M. c. 11, s. 3, and ought to have their costs. My brother Coleridge dissents from this opinion, and considers the interest of the prosecutors to be too remote and uncertain to admit of the application of that statute.

Rule discharged.

WESTERN CIRCUIT.

SOMERSET SPRING ASSIZES, 1849.

Taunton.

(Before LORD DENMAN, C. J.)

REG. v. MARK CLEEVES AND WILLIAM CHIVERS. (a)

*Practice—Indictment for a felony, including an assault—Pleading guilty to the assault only.**Semble, that upon an indictment for a felony, which felony includes an assault, it is not competent to the prisoner to plead guilty to an assault and not guilty to the felony.**The two prisoners were indicted for a robbery, with violence, and having pleaded not guilty to the entire charge, afterwards, with the consent of the prosecutor's counsel, who stated that he was willing to offer no evidence of the felony, wished to withdraw their plea and plead guilty to a common assault.**Held, that the proper course, under such circumstances, would be for the prisoners to plead not guilty generally, and for the prosecutor to offer evidence only of the assault, and for the jury to return a verdict accordingly of guilty of a common assault only.*

THE two prisoners were indicted for assaulting the prosecutor and robbing him of five pence halfpenny, to which indictment they had, at an earlier period of the day, pleaded not guilty. The indictment contained only one count, which was the ordinary one for a robbery with violence. Upon the case coming on,

Edwards, for the prisoners, applied for leave to withdraw the plea of not guilty, and for permission for them to plead guilty to a common assault.

T. W. Saunders, for the prosecution, said, that having carefully considered the case, he was of opinion that the charge of robbery could not be supported, and that the facts would only warrant a verdict for an assault; and that if, therefore, it was competent on the present indictment to take a plea of guilty of a common assault, he thought the ends of justice would be sufficiently answered by such a proceeding, and he would offer no evidence of the higher offence. (b)

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

(b) By the 7 Will. 4 & 1 Vict. c. 85, s. 11, it is enacted, "that on the trial of any person for any of the offences thereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding," &c.

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LORD DENMAN, C. J.—I think upon this indictment the proper course, in order to carry out the proposed arrangement, will be for the prisoners to plead not guilty, and for some evidence of an assault only to be given, and the jury to return a verdict of guilty of a common assault, under the statute.

Evidence of an assault was then given, whereupon his lordship directed the jury to find a verdict of guilty of a common assault.

Verdict accordingly. (a)

NORTHERN CIRCUIT.

LIVERPOOL SPRING ASSIZES, 1848.

(Before BARON ALDERSON.)

REG. v. ABRAHAM.

Evidence—Prisoner's statement.

Where a prisoner had made a statement which accounted for the possession of stolen property before search made, or any suspicion excited: Held, to be admissible for him.

INDICTMENT for burglary.

Monk for the prosecution.

J. Pollock for the prisoner.

The evidence was, that some glass jars, which had been taken from the prosecutor's shop, were found in the prisoner's house, not concealed. The prisoner had said, before any suspicion was excited, that he had found them in a field.

J. Pollock, on behalf of the prosecution, had urged this upon the attention of the jury.

ALDERSON, B., in summing up, said, that if it was proved that the prisoner had given such an account of his possession of the stolen property to his neighbours, before suspicion existed, or search made, he had not the slightest doubt that, *valeat quantum*, it would be good evidence for the prisoner.

Guilty.

(a) See *Reg. v. Jones*, 545, *post*.

OXFORD CIRCUIT.

BERKSHIRE SPRING ASSIZES, 1848.

Reading, March 1.

(Before MR. JUSTICE PATTESON.)

REG. v. ARLETT.

*Practice—Misdemeanor—Quarter Sessions—Jurisdiction.**Upon a bill for a misdemeanor, found at the Quarter Sessions, the defendant traversed.**Held, that the traverse was to the next Quarter Sessions, and not to the assizes which preceded them; and that, although the defendant was in prison, the judge would not permit him to be discharged on his own recognizances.**The Commission of Gaol Delivery extends only to prisoners in the gaol, and not to prisoners in the house of correction.**The judge of assize will discharge, upon his own recognizance, a prisoner committed to the gaol for trial at the Quarter Sessions (where such sessions are to be held after the assizes), if an indictment be not preferred against him at such assizes.*

AN indictment had been found against the defendant at the Berks Quarter Sessions for poaching, under stat. 9 Geo. 4, c. 69, s. 1, which was a misdemeanor triable at the sessions. Upon the bill so found, the defendant was committed for trial at the next Quarter Sessions, but he availed himself of the right to traverse, given by stat. 60 Geo. 3 & 1 Geo. 4, c. 4, and had continued in prison in default of bail; but the assizes having come on before the sessions,

J. J. Williams, for the defendant, applied that he may be discharged on his own recognizances. He knew only of one case that bore any resemblance to this. In the Spring Circuit of 1838 some prisoners had been committed to the Quarter Sessions that followed the assizes, and Baron Gurney, being of opinion that he was bound to deliver the gaol, under his commission, sent for the prosecutors, all of whom attended and prosecuted at the assizes, save one, and in that case the prisoner was discharged on his own recognizance.

Carrington, for the prosecution, was not called upon.

PATTESON, J.—The question in this case is, whether a person who has chosen to traverse, upon a bill found at the sessions,

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traverses to the next sessions or to the assizes, if they are held before the sessions. Clearly he must traverse to the sessions. The indictment is not here. I have no jurisdiction. I know nothing of the case; it is not before me. The sessions have already dealt with it, there the defendant has pleaded, and they have permitted him to traverse. Baron Gurney rightly dealt with the cases of the prisoners committed over the assizes to the next sessions; but it is an error to suppose that the Commission of Gaol Delivery requires that all untried prisoners should be tried, for, in fact, the commission is applicable only to prisoners in the county gaol and not to such as are confined in a house of correction. In Yorkshire, for instance, the judges deliver York Castle, but they do not try the prisoners committed to the Wakefield House of Correction for trial at the Quarter Sessions held after the assizes.

Application refused.

OXFORD CIRCUIT.

BERKSHIRE SPRING ASSIZES, 1848.

(Before Mr. JUSTICE CRESSWELL.)

REG. v. BARNETT, O'BRIEN AND WHITNEY.

Robbery—Assault.

Upon an indictment of three prisoners for robbery, with violence, it was proved that A. knocked the prosecutor down and B. and C. took his property from his pockets.

Held, that if A. took no part in the robbery, he could not be convicted of an assault, inasmuch as the assault was unconnected with the robbery, and therefore an independent offence.

Held, also, that it was competent to the jury to find all the prisoners guilty of an assault, if they were of opinion that the prosecutor had not been robbed by either of them, but only assaulted by all of them.

THE prisoners were indicted for robbery with violence.
Turner for the prosecution.

Carrington for Barnett.

J. J. Williams for O'Brien and Whitney.

It was proved that, at midnight, the prosecutor was knocked down in a street in Reading by prisoner Barnett; then, missing his watch, he complained of the loss, and the two other prisoners, pretending to search for it, cut off the pocket of his trowsers, and carried it away with the money it contained. Then prisoner Barnett assisted him to a house to wash the blood from his face.

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Upon these facts, it was contended by *Carrington*, for prisoner Barnett, that he had not participated in the robbery, and if so the assault was an independent offence, for which he could not be convicted under this indictment.

J. J. Williams for the other prisoners.

CRESSWELL, J., to the jury.—If you are of opinion that all the prisoners were parties to the robbery, all should be found guilty of the crime charged in this indictment, even although it was not by Barnett's own hand that the money was taken. If you are of opinion that Barnett had no part in it, but only the other two, you will acquit him and find them guilty. You cannot convict him of the assault only, because the assault, which he undoubtedly committed, was an independent assault, and not a part of or connected with the crime charged in the indictment. If you are of opinion that robbery was not committed by either of the prisoners, you may find them all guilty of an assault, for the charge in the indictment includes a joint assault.

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BARNETT,
O'BRIEN
AND
WHITNEY.

Robbery with
violence.

Guilty of an assault.

OXFORD CIRCUIT.

Stafford, March 12, 1849.

STAFFORDSHIRE GRAND JURY. (a)

Practice—Grand jury.

The number of jurors sworn upon the grand inquest is not necessarily limited to twenty-three—Sed quære.

UPON calling over the names of the grand jurors returned to serve at the Stafford Assizes, the officer of the court marked off twenty-three as having answered to their names. The oath was duly administered to the foreman and his twenty-two fellows, and Platt, B., was about to charge them, when two grand jurors who were in the grand jury box said they had not been sworn. On being interrogated, it appeared that their names were not among those marked as having answered when called upon, although duly summoned to serve, but that they had answered to their names, though not sufficiently audibly to be heard by the clerk of assize, who had consequently passed them over. Under these circumstances, the learned judge directed them to be sworn. His lordship's attention was called to a passage in Chitty's Crim. Law, but

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

STAFFORD-
SHIRE GRAND
JURY.

Practice—
Grand jury.

PLATT, B.—The authority cited is somewhat obsolete, and, although it is necessary that twelve of the grand jury must agree to find a bill, I see no reason why the number should necessarily be limited to twenty-three.

The two jurors were then added to the number, and sworn, making the total number of the panel twenty-five.

[It is submitted that this dictum of the learned judge cannot be considered as a correct one. His lordship, probably, would not have allowed the addition to be made if his attention had been called to the case of *Rez v. Marsh* (6 Ad. & Ell. 236), where it was expressly ruled by the Court of Queen's Bench, that a grand jury must not consist of more than twenty-three. The authorities cited in that case were Co. Litt. 126, b.; 2 Hale's P. C. 154; 4 Hawk. P. C. 1, Book 2, c. 25; 4 Bac. Abr. 295, tit. "Indictment;" 4 Bla. Com. 302. The last-mentioned text writer states that the number is limited to twenty-three, in order that twelve may be a majority. In the principal case (*Rez v. Marsh, supra*), Lord Denman, C. J., said, "The court has no doubt that twenty-three is the limited number. It is a matter of practice proved by authorities in the only way in which proof can be given of a point of that kind which has been undisputed."—J. E. D.]

OXFORD CIRCUIT.

Hereford, March 24, 1849.

REG. v. HANKINS. (a)

Evidence—Documents in the hands of a prisoner's attorney—Lien—Notice to produce.

Seemle, the rule of evidence which prohibits an attorney who has received documents from a client in a professional character from producing them in evidence against that client, applies to documents which are the subject-matter of the charge.

The rule extends to cases where the attorney has a lien upon the documents.

Notice to produce a document, served upon the defendant's solicitor the day before the trial, but after the commencement of the assizes, is sufficient to let in secondary evidence.

THE defendant was indicted for perjury. The perjury was alleged to have been committed on the trial of an action in the County Court, held at Ross, on the 16th of September, 1848, upon which trial the defendant Hankins (who was plaintiff in the action) swore that an account which he produced, written in ink, signed by William Dickens, the defendant in the action, was in the same state then as when it was so signed. The perjury assigned being, that when it was signed by Dickens it was in fact not in the same state, but in pencil.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law

Mr. Minett, an attorney and solicitor, was called as a witness on the part of the prosecution. He stated that on the trial of the action in the County Court he was the attorney of Hankins; that he now had in his possession two papers produced by Hankins on that occasion, one being the account in question; that he received them from Hankins as his attorney and solicitor; that in October he ceased to act as Hankins's solicitor; that he retained the papers and claimed a lien upon them for professional services; that an execution for the amount of his bill had been issued against Hankins a few days before the assizes; that no return had been made of the result of that process; that if it did not satisfy the amount he still claimed a lien upon the papers. He had been served with a *subpœna* to produce them on the trial of this indictment, and was ready to do so.

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—Notice to
produce.

Upon this evidence,

Skinner and Gray, for the prosecution, proposed to have the account put in and read.

Godson, Q. C. (with whom was *W. H. Cooke*), for the defendant, objected to the reception of the document in evidence, on the ground that Mr. Minett, having received it in his professional capacity from the defendant, ought not to be permitted to produce it in evidence against him. *Rex v. Dickson* (3 Burr. 1687), cited in Greaves' *Russell on Crimes*, vol. 2, p. 908, was in point. In that case it was held by Lord Mansfield and the rest of the court, that an attorney who had been served with a *subpœna duces tecum* out of the Crown Office to produce certain vouchers which his client, a Mr. Peach, had exhibited and relied on before a Master in Chancery, and which *subpœna* had been served on the attorney in order to found a prosecution for forgery against his client, was not bound to produce these required vouchers. In Archbold's *Pleadings and Evidence in Criminal Cases*, by Jervis, 10th edit. p. 148, the general rule is thus laid down:—"Counsel, solicitors, and attorneys, are privileged from giving (indeed, they will not be permitted to give) evidence of any matters confided to them by their clients in their professional capacity, either in the cause respecting which the communication was made, or in any other; and whether the client be a party to the cause or not; or whether the business on which the attorney was retained had reference to legal proceedings, either existing or in contemplation, or not. So an attorney is not bound, on a *subpœna duces tecum*, to produce any deeds or papers belonging to his client in his custody, if it appear that the production will operate to the prejudice of his client."

Skinner and Gray, for the prosecution, submitted that the rule did not apply to cases where the document sought to be put in evidence was the foundation of the charge against a prisoner. (a) In this case, if the document had been found upon the defendant when in custody, it might and would have been given in evidence against him; how, then, could he prevent his solicitor from pro-

(a) See *Reg. v. Avery* (8 C. & P. 596), and remarks upon that case, 1 Phill. Evid. 171.

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ducing it who was willing to do so? Here, however, the document was out of the control of the defendant. Mr. Minett had a lien upon it; he therefore had the possession and the right of possession, and the defendant was divested of his possession and control over the document.

COLTMAN, J.—The defendant has an interest in the paper notwithstanding. I reserved a case on this point as to whether the rule in question applies to a document which is the subject-matter of a criminal charge, on the Norfolk circuit last year, but it finally went off without a decision being given. I think I cannot receive the evidence. Perhaps secondary evidence can be given which will avoid the difficulty.

Service of a notice to produce the account was then proved. The notice was served at one o'clock on the day before the trial, being the day after the commission day of the assizes at Hereford. It was served at Hereford upon Mr. Edwards, the defendant's attorney.

The counsel for the prosecution now proposed to give secondary evidence of the contents of the document.

Godson, Q. C., and W. H. Cooke, objected that the notice to produce was insufficient, on two grounds. First, because it was served on the attorney and not on the defendant, who could not appear by attorney; and, secondly, because the notice was not given in time. It was served after the commencement of the assizes, which began on Thursday, the notice to produce being served on Friday. The notice to produce a document at the assizes, made after the assizes began, was equivalent to no notice at all.

COLTMAN, J., overruled both objections, observing that the service on the attorney was in fact a service on the defendant.

Secondary evidence was then given by the Clerk of the County Court of the contents and state of the account when produced before the Judge of the County Court, and also by Dickens of its state when signed by him.

The defendant was ultimately acquitted.

OXFORD CIRCUIT.

Gloucester, April 3, 1849.

REG. v. JOHN BROWNING. (a)

Evidence—Pawnbrokers Act—False declaration.

To prove the making of a false declaration under the Pawnbrokers Act (39 & 40 Geo. 3, c. 99), it is not absolutely necessary to call the magistrate before whom it was made, or some one present at the time. It is sufficient to show such facts as necessarily lead to the conclusion that the defendant made it, and had a knowledge of the contents. Sed quære.

To prove that such a declaration is false in fact, it is necessary to negative the defendant's statement by the oath of two witnesses, in the same manner and to the same extent as the proof of an assignment for perjury.

THE defendant was indicted for having, at Stroud, in the county of Gloucester, on the 15th of December, 1846, wilfully and corruptly made a false declaration before Edmund Gilling Halliwell, Esq., one of Her Majesty's justices of the peace for the said county, that he had lost a certain note or memorandum, being a pawnbroker's ticket, whereas, in truth, he had not lost it, but had sold it to one Charles Bingle. (b)

Gray, for the prosecution, in stating the case to the jury, sought the opinion of the learned judge (Platt, B.) as to the sufficiency of

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

(b) By stat. 39 & 40 Geo. 3, c. 99, s. 16, it is enacted that in case any note or memorandum delivered by a pawnbroker of goods pledged to him, shall be lost, mislaid, destroyed, or fraudulently obtained from the owner, then the pawnbroker "shall, at the request and application of any person, &c., who shall represent himself, &c., to the pawnbroker as the owner, &c., of the goods and chattels in pledge as aforesaid, deliver to such person, &c., a copy of the note or memorandum so lost, mislaid, &c., with the form of an affidavit of the particular circumstances attending the case, printed or written, &c., on the said copy, as the same shall be stated to him or her by the party applying as aforesaid, &c.; and the person, &c., having so obtained such copy of the note or memorandum and form of affidavit as aforesaid, shall thereupon prove his, her, or their property in, or right to, such goods and chattels, to the satisfaction of some justice of the peace, &c., and shall also verify, on oath or affirmation, as the case may be, before the said justice, the truth of the particular circumstances attending the case mentioned in such affidavit or affirmation to be made as aforesaid, the caption of such oath or affirmation to be authenticated by the handwriting thereto of the justice before whom the same shall be made, and who shall, and is hereby required so to authenticate the same, whereupon the pawnbroker shall suffer the person, &c., proving such property to the satisfaction of such justice as aforesaid, and making such affidavit or affirmation as aforesaid, on leaving such copy of the said note or memorandum and the said affidavit or affirmation with the said pawnbroker, to redeem such goods or chattels."

The 5 & 6 Will. 4, c. 62, s. 12, substitutes a declaration in lieu of the affidavit above mentioned; and sect. 21 enacts that any person "who shall wilfully and corruptly make and subscribe" any declaration substituted for an oath by that statute, "knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor."

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the evidence which he was prepared to offer in support of the case. The defendant had pledged certain articles to a pawnbroker at Stroud, for which he received a memorandum or duplicate, and had subsequently gone to him and stated that he had lost the ticket or duplicate. The pawnbroker told him he must make a declaration of the loss before a magistrate, and for that purpose handed the prisoner a copy of the ticket, and a form to be filled up, according to the provisions of the 39 & 40 Geo. 3, c. 99. The defendant took the form and paid for it, saying he would go to a magistrate. He returned the same day with the form properly filled up, and with his name and that of Mr. Hallewell attached. Upon his presenting it, the pawnbroker gave him the articles pledged; another person afterwards applied for the things with the original duplicate, when it appeared that the prisoner had sold that duplicate in a public-house on the day that he produced the declaration and obtained the second in lieu of it. The magistrate was not in attendance to prove the fact of the declaration having been made by the defendant; the fact being that he had no recollection of the circumstance one way or the other. The pawnbroker, however, identified the declaration, and a witness was present to prove the sale and transfer of the ticket in the public-house, as alleged.

PLATT, B.—As regards the proof of the declaration having been made by the defendant, I think there may be sufficient evidence to support the indictment, if you can bring home to him a knowledge of the contents; but I am of opinion that the falsity of that declaration must be proved by the oaths of at least two witnesses, as in a case of perjury, otherwise there would be merely oath against oath. I understand that there is only one witness to prove this part of the case, and therefore I think the prosecution cannot be supported.

No evidence was offered, and the defendant was acquitted.

[There can be no doubt as to the correctness of the learned baron's ruling on the last point, but the very analogy of the proof in a charge of perjury leads to the inference that the fact of the declaration having been made must be proved with the same strictness as in an indictment for perjury. The making a false declaration is made a misdemeanor by the act of Parliament, which substitutes a declaration in lieu of the oath in this and certain other cases; and it could never be contended that an indictment for perjury could be sustained by evidence of the above description.—J. E. D.]

NORFOLK SPRING CIRCUIT, 1849.

Bury St. Edmunds, March 19.

(Before Mr. BARON ROLFE.)

REG. v. LONGBOTTOM AND ANOTHER. (a)

Manslaughter—Negligence of deceased.

Wherever death ensues from injuries inflicted by parties engaged in any illegal act, an indictment for manslaughter will lie, even though it appear that the deceased had materially contributed to his death by his own negligence.

THE indictment charged, that the two prisoners feloniously killed and slew John Truman, by driving over him with a gig.

O Malley and *E. Rodwell*, for the prosecution, proved that the two prisoners, who lived in Ipswich, had gone to Bentley on the day named in the indictment in a gig, and that on their return at night they were observed to be in a state of partial intoxication. At several places they drove along the high road at a very rapid pace, and when they got within two miles of Ipswich they met three men. At that time they were laughing and driving rapidly down a hill, the top of which was thickly shaded with trees. When the three men got to the trees they found a man lying insensible in the middle of the road, presenting all the appearance of having been just run over by some vehicle. They took up the man, who shortly afterwards died. On inquiry it turned out that the deceased was a man who had been deaf from childhood, but had, in spite of his infirmity, contracted an inveterate habit of walking at all hours in the middle of the road. Against the probable consequences of an indulgence in this habit he had been frequently warned, but without effect.

D. D. Keane, for the prisoner Longbottom, submitted, at the close of the case for the prosecution, that he ought to be acquitted, inasmuch as it appeared that the deceased had contributed in a great measure, if not altogether, to his own death by his own obstinacy and negligence. There was, moreover, no proof that the prisoners were driving at any extraordinary pace; while it appeared that they were in the middle of the road, and that the deceased was walking just where he ought not to have been, reference being had to the lateness of the hour, the darkness of the place, and his peculiar infirmity, which ought to have induced him to refrain from the selection of the most frequented part of the high road,

(a) Reported by J. B. DASENT, Esq., Barrister-at-Law.

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as that on which alone he would walk. No accident could possibly have occurred to the deceased, if he had been at the side of the road, where foot passengers always walked. He had, therefore, contributed to his own death, and the question was, whether that fact did not exonerate the prisoners from such a charge as the present. This might be tested by analogy with a civil action under Lord Campbell's Act. Under that statute the representatives of the deceased could not maintain an action for compensation against the prisoners, as he had himself been guilty of negligence, so, in this prosecution, it was contended that the prisoners could not be convicted of the crime of manslaughter.

ROLFE, B.—I cannot stop the case; for whatever may have been the negligence of the deceased, I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent conduct, if any such existed. I am of opinion that if any one should drive so rapidly along a great thoroughfare leading to a large town, as to be unable to avoid running over any pedestrian who may happen to be in the middle of the road, it is that degree of negligence in the conduct of a horse and gig which amounts to an illegal act in the eye of the law; and if death ensues from the injuries then inflicted, the parties driving are guilty of manslaughter, even though considerable blame may be attributed to the deceased. I do not at all recognize the analogy which has been put with regard to an action under Lord Campbell's Act and a charge of felony; and I abstain from giving any opinion as to the question whether, under the circumstances here proved, the representatives of the deceased would be precluded from maintaining an action for compensation against the prisoners. But there is a very wide distinction between a civil action for pecuniary compensation for death arising from alleged negligence and a proceeding by way of indictment for manslaughter. The latter is a charge imputing criminal negligence, amounting to illegality; and there is no balance of blame in charges of felony, but wherever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter in point of law, though it may be that he ought not to be severely punished. If the jury should be of opinion that the prisoners were driving along the road at too rapid a pace, considering the time and place, and were conducting themselves in a careless and negligent way in the management of the horse entrusted to their care, I am of opinion that such conduct amounts to illegality, and that the prisoners must be found guilty on this indictment, whatever may have been the negligence of the deceased himself.

Verdict, guilty.

Sentence—eight months' imprisonment.

D. Power was counsel for the other prisoner.

CENTRAL CRIMINAL COURT.

JANUARY SESSION, 1848.

January 8.

(Before Mr. JUSTICE PATTESON.)

REG. v. JONES. (a)

Wounding, with intent—7 Will. 4 & 1 Vict. c. 85.

Evidence of a violent kick in the private parts of a woman, which caused a flow of blood mingled with urine for some time afterwards, is not a wounding within the statute, no proof being given as to the precise part whence the blood originally came.

On such an indictment a prisoner cannot plead guilty to a common assault.

THE prisoner was indicted for wounding, with intent to do grievous bodily harm.

Bodkin (for the prosecution), in opening the case, stated the nature of the wound to have been as follows:—The prisoner had come behind the prosecutrix and given her a violent kick in the private parts, and that had been followed by an occasional discharge of blood, mingled with urine, but the surgeon could not undertake to say from what precise vessels the blood originally flowed.

PATTESON, J.—Then I do not think the more serious charge in this indictment sustainable. There may have been no lesion of any of the vessels at all. Blood may be discharged from those parts simply from natural causes.

Parry (for the prisoner), then offered on his behalf to plead guilty to the common assault.

PATTESON, J.—He cannot do that; he may be found guilty of the assault under 1 Vict. c. 85, s. 11; but that statute gives me no authority to receive such a plea. (b)

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

(b) See next case.

CENTRAL CRIMINAL COURT.

FEBRUARY SESSION, 1849.

February 3.

(Before Mr. JUSTICE CRESSWELL.)

REG. v. WALTHAM. (a)

Wounding, with intent.

A rupture of the lining membrane of the urethra, followed by a small flow of blood, such rupture being caused by a kick in the private parts of the prosecutor, is a wounding within the 7 Will. 4 & 1 Vict. c. 85, s. 4.

THE prisoner was indicted for wounding the prosecutor, with intent to do him grievous bodily harm. It appeared from the evidence that the prosecutor (who was a policeman), while endeavouring to separate the prisoner and a man with whom he was fighting, received from the former a violent kick in his private parts. From the testimony of the surgeon, it appeared that the external skin was unbroken, but that the lining membrane of the urethra was ruptured, which caused a small flow of blood, mingled with urine, for two days. That membrane is precisely the same in character as that which lines the cheek and the external and internal skin of the lip.

Parry (for the prisoner) objected that this was not a wounding within the statute, and cited *Reg. v. Jones*, Central Criminal Court, January, 1848, *ante*, 545; that case was very similar to the present; there is no external wound.

CRESSWELL, J.—If the cases were similar I should abide by the ruling of Mr. J. PATTESON; but there is a great difference between them. I think this is a wounding within the statute.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

CENTRAL CRIMINAL COURT.

NOVEMBER SESSION, 1848.

November 1.

REG. v. SMITH AND OTHERS.(a)

1 & 12 Will. 3, c. 7—*Mutiny—Mariner within Merchant Seaman's Act, 7 & 8 Vict. c. 112, s. 2.*

A seaman engaged by the master of a vessel, and taken to sea without any such written agreement having been entered into between them as is rendered necessary by the 7 & 8 Vict. c. 112, s. 2, is not a seaman or mariner within the 11 & 12 Will. 3, c. 7, s. 9, and therefore is not liable under that section for making a revolt, by deserting his vessel in port, and inducing the rest of the crew to do the same.

Example, a merchant vessel is a ship within the meaning of that section.

THE prisoners were arraigned upon the following indictment:—Indictment.
 “Central Criminal Court, to wit:—The jurors for our lady the Queen, upon their oath present that James Jennings Smith, late of London, mariner; Alexander Reid, late of the same place, mariner; John James, late, &c.; David Gillies, &c.; James Payne, &c.; John Kelly, &c.; Robert Barclay, &c.; Edward Torrell, &c.; and John McDonald, late of the same place, mariner, on the 16th day of September, A.D. 1848, were mariners, and each of them was a mariner in and on board of and belonging to a certain ship called the *Lion*, then lying and being in a certain place upon the high seas called the port of Harlingen, in Friesland, in Holland, in parts beyond the seas within the jurisdiction of the Admiralty of England, and within the jurisdiction of the Central Criminal Court, whereof one Henry William Neville, then being a subject of our lady the Queen, then and there was master; and the jurors aforesaid, upon their oath aforesaid, do further present that the said J. J. Smith (and the others before mentioned), being such mariners, and each of them being such mariner as aforesaid, on the day aforesaid, in the year aforesaid, with force and arms upon the high seas aforesaid, within the jurisdiction of the Admiralty aforesaid, and within the jurisdiction of the Central Criminal Court, piratically and feloniously did endeavour to make a revolt on the said ship, so then and there lying and being as aforesaid, the said H. W. Neville, the master thereof, then and there being in and on board of the said ship, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.”First count.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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SMITH AND
OTHERS.

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Merchant
Seaman's Act.

Second count.

Stat. 11 & 12
Will. 3, c. 7,
s. 9.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. J. Smith (and the others before mentioned), on the day aforesaid, in the year aforesaid, were mariners, and each of them was a mariner in and on board of a certain ship called the *Lion*, then lying and being in a certain place upon the high seas called the port of Harlingen, in Friesland, in Holland, in parts beyond the seas within the jurisdiction of the Admiralty of England, and within the jurisdiction of the Central Criminal Court, whereof the said H. W. Neville, then being a subject of our lady the Queen, then and there was master; and the jurors aforesaid, upon their oath aforesaid, do further present that the said J. Jennings Smith, &c., being such mariners as last aforesaid, on the day aforesaid, in the year aforesaid, with force and arms upon the high seas aforesaid, within the jurisdiction of the Admiralty aforesaid, and within the jurisdiction of the Central Criminal Court, piratically and feloniously did make a revolt in the said last-mentioned ship so then and there lying and being as last aforesaid, the said H. W. Neville, the master thereof, then and there being in and on board of the said last-mentioned ship, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

The indictment was framed on the 9th section of the 11 & 12 Will. 3, c. 7, which enacts that "if any commander or master of any ship, or any seaman or mariner, shall, in any place where the admiral hath jurisdiction, betray his trust, and turn pirate, enemy, or rebel, or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust, or shall confine his master, or make or endeavour to make a revolt in the ship, he shall be adjudged, deemed, and taken to be a pirate, felon, and robber," &c.

It appeared in evidence that the prosecutor was the master of a steam-ship trading between London and Holland. The prisoners formed part of the crew,—Smith being chief engineer; Reid, second engineer, and the rest firemen and coal trimmers. Their register tickets were deposited with the captain, but no agreement in writing had been entered into with them previously to their sailing from London on this particular voyage. On the 14th of September they arrived at Harlingen, and took in a general cargo, and were to leave on the following morning. The next day the fires were all lighted, the steam was up, and the vessel was about to start, when, in consequence of some dispute arising between the prisoner Smith and the captain, the former declared he would leave the ship, and with much violence of gesture and language, he called out to the other prisoners to rake the fires out and come on shore. This they at length did, and the prisoners left, having first endeavoured, but without success, to persuade another man to join them. The captain, having no crew to work the vessel, was obliged to hire another steamer, and leave his own in port.

Clarkson (for the prosecution), contended that upon these facts

the charge was made out (*R. v. Hastings*, 1 Moo. C. C. 32.) It was clear that the crew were making a revolt when they repudiated the authority of the captain, refused to work, and left the vessel against orders. Then, was this vessel, though a merchant vessel, a ship within the 9th section of 11 & 12 Will. 3, c. 7? It was clear that the word "ship" in that section was not confined to a "King's ship," for the section commences by speaking of the commander of "any ship;" the terms are therefore general enough to include all. [The RECORDER.—Yes, that appears to be the case.] The next question is this, are these men mariners? I submit that all men embarking in a vessel, having a duty to perform in her as contradistinguished from passengers, are what the act means by mariners, and that, although the duty of these men was to attend to the engines and fires, and not to the rigging, they are as completely within that term as sailors who navigate an ordinary sailing vessel. Then comes a question on which the defence appears to rest; will the absence of a written agreement divest these men of a character which they have voluntarily assumed? The 7 & 8 Vict. c. 112, s. 2, enacts "that it shall not be lawful for any master of any ship, of whatsoever tonnage or description, belonging to any subject of Her Majesty, proceeding to parts beyond the seas, to carry to sea any seaman, as one of his crew or complement (apprentices excepted), unless the master of such ship shall have first made and entered into an agreement in writing with such seaman, specifying what wages such seaman is to be paid, the quantity of provisions he is to receive, the capacity in which he is to act or serve, and the nature of the voyage in which the ship is to be employed, so that such seaman may have some means of judging of the period for which he is likely to be engaged; and that such agreement shall be properly dated, and shall be signed by such master in the first instance, and by the seamen respectively at the port or place where they shall be shipped; and that the signature of each of the parties thereto shall be duly attested by one witness at the least, and that the master shall cause the agreement to be read over and explained to every such seaman in the presence of such witness, before such seaman shall execute the same," &c. I contend that the statute was never intended to apply to such a case as this, where the seamen leave port on one day, and reach their destination the next. The men are engaged for a lengthened period, and the greatest inconvenience would arise if it were held necessary to have a fresh agreement every few days. [The RECORDER.—I see no exception in the act with regard to short voyages, and shall certainly rule that such a case as this is within the section you have quoted.] But, admitting that to be so, the prisoners are still liable upon this indictment. The acts of Parliament are entirely distinct. It may be that the captain is liable to a penalty for not entering into the agreement, but that will not divest the seamen of all culpability if they do that which amounts to a revolt. The men enter the service. If the act was intended for their protection, they waive their

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right by the course which they pursue: they may have purposely abstained from insisting on any agreement in order to carry out an unlawful scheme that they have previously projected. They cannot take advantage of their own negligence. They cannot commit that which the law declares to be a crime, and then escape from the consequences because some formalities connected with their engagement have not been complied with. The captain may have been guilty of a breach of duty; but the question here is not between these men and the captain, but between them and the public. They contract—though not in strict form—to do a certain duty, and instead of performing it, they mutiny against their commander. It is true in this case there was little risk to life involved in the course they pursued, but if they may revolt with impunity here, they might do so at sea, under circumstances that might jeopardize the lives of a number of individuals. The act 11 & 12 Will. 3, c. 7, includes mariners or seamen: now these men are not the less mariners or seamen because certain conditions mentioned in another act have not been performed.

The RECORDER.—I think the statute under which these men are indicted must be construed strictly. The men, to be brought within it, must be mariners or seamen. The statute certainly imposes, in one section, a penalty for taking them without an agreement, but in the enacting clause it renders taking them under such circumstances entirely illegal: the words are “it shall not be lawful.” Any contract, therefore, in contravention of that act, would be null and void. If so, the relation of mariner and commander does not exist. They are under no obligation, therefore, to do that which, however improperly, they have refused to do. I shall direct the jury to acquit them.

Clarkson, Ballantine, and Sleigh, for the prosecution.

Huddleston and Metcalfe for the defence.

CROWN CASE RESERVED.

April 30, 1849.(Before WILDE, C. J., WIGHTMAN, J., ROLFE, B.,
CRESSWELL, J., and PLATT, B.)

REG. v. MARTIN. (a)

Indictment—Venue—Practice.

An indictment found by a grand jury of Dorsetshire contained two counts, one (the 5th) charging A. with sheep stealing in Dorsetshire; and another charging B. with feloniously receiving in Somersetshire a sheep before then feloniously stolen, &c., "being the same property as mentioned in the 5th count."

Held, that the 2nd count was bad, for not showing jurisdiction to try in Dorsetshire; the words of reference to the 5th count not being sufficient for that purpose.

A question of law raised by motion in arrest of judgment after the conviction of the prisoner may be reserved under 11 & 12 Vict. c. 78.

This court will hear counsel in support of the conviction, though no counsel are instructed on the part of the prisoner.

THIS was a case reserved by the Court of Quarter Sessions for Case. the County of Dorset. The prisoner, John Martin, was tried, with two other prisoners named Geo. Eades and Charles Eades, at the last Dorset Epiphany Sessions, upon an indictment for sheep stealing, with counts for receiving, &c. The following were the material counts of the indictment:—

5th count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Geo. Eades and Charles Eades, on the said 18th day of December, in the 12th year of the reign aforesaid, with force and arms, at the parish of Sherbourne aforesaid, in the county of Dorset aforesaid, one wether sheep, of the price of 20s., of the cattle, goods, and chattels of the said Henry Ensor, then and there feloniously did steal, take, and drive away, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity. Indictment.

7th count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Martin, on the said 18th day of December, in the 12th year of the reign aforesaid, with force and arms, at the parish of Trent, in the county of Somerset, one wether sheep, of the price of 20s. (being the same property as is mentioned in the 5th count of this indictment), of the cattle, goods, and chattels of the said Henry Ensor, before then feloniously

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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stolen, taken, and carried away, feloniously did receive and have, he, the said John Martin, then and there well knowing the said cattle, goods, and chattels last aforesaid, to have been feloniously stolen, taken, and carried away, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

Case.

The two Eades were found guilty upon the 5th count of the indictment for stealing, and sentenced each to seven years' transportation. The prisoner Martin was found guilty on the 7th count for receiving, and thereupon the learned counsel for the prisoner Martin moved in arrest of judgment, upon the ground that the count on which the prisoner was convicted was bad upon the face of it, for several reasons—1. For a total want of venue; or, 2, for a wrong venue; or, 3, for a venue so deficient and imperfect as not to be cured by statute. 4. That the defect is not to be cured by reference to the venue in the margin; 5, or by reference to any other venue in the indictment; 6, or by the parenthesis in such 7th count. 7. That the property is insufficiently laid and described in such 7th count. 8. That such insufficient description is not cured by the parenthesis aforesaid. 9. That it in no way appeared in the said 7th count that the property the prisoner was charged with receiving was stolen in the county of Dorset so as to give the court jurisdiction. 10. And generally, that as such 7th count is a distinct and separate charge of a substantive felony in its terms, of which the prisoner (Martin) might be convicted, although an acquittal of the principals had taken place, it must be taken *per se* as if it had constituted the whole indictment; and if bad cannot be cured *aliunde*. The court overruled the objections, considering the defect cured by the 7 & 8 Geo. 4, c. 29, s. 56, and by the late stat. 11 & 12 Vict. c. 46, s. 2, and thereupon sentenced the prisoner to seven years' transportation, but respited the execution of the judgment until the opinion of Her Majesty's judges should have been received upon the case reserved.

Argument for
the prosecution.

Efooks for the prosecution.

ROLFE, B.—Can we hear you, no counsel being instructed for the prisoner?

Carrington, amicus curiæ, mentioned that this court had done so in *Reg. v. Masters* (1 Den. C. C. 332; 3 Cox's C. C. 178.)

WILDE, C. J.—The statute provides for the case; you are entitled to be heard: (sect. 3 of 11 & 12 Vict. c. 78.)

Efooks.—There is a preliminary objection to the hearing of this case, which is, that the question reserved did not arise "on the trial," but after the conviction of the prisoner; and that, therefore, the court had no power to reserve the case: 11 & 12 Vict. c. 78, s. 1. [ROLFE, B.—Surely it arises on the trial.] No; after the trial is over. The trial concludes with the conviction. [PLATT, B.—The statute says expressly that the judgment may be arrested by this court. ROLFE, B.—The words "on the trial" ought to receive a liberal construction.] Then the 7th count is sufficient.

The words of reference in that count cannot, perhaps, be construed to incorporate the whole of the 5th count (*R. v. Waters*, 1 Den. C. C. 356; 3 Cox C. C. 300; *R. v. Martin*, 9 Car. & P. 217); but the law as to receivers of stolen property is much altered by 11 & 12 Vict. c. 46; of which sect. 2 authorizes the trial of the receiver, on the substantive charge, in any county in which the principal might be tried. Then the reference to the 5th count is sufficient to show that the receiver was tried with the principal. [WILDE, C. J.—We must see either a jurisdiction at common law, by the commission of the offence within the county, or a jurisdiction given by statute. It is clear that this count does not state anything done by any person in the county of Dorset; but there is a statutory jurisdiction to try in any county where the prisoner has the property in his possession, and also to try the receiver anywhere where the thief may be tried; but this count does not show that the thief could be tried in Dorsetshire. How, then, does any jurisdiction appear? Nobody appears to have done anything in Dorsetshire.] If the whole of the 6th count is imported, it shows that the thief was indicted at the same place. [WIGHTMAN, J.—The 7th count does not show even who the principals were.] It says that the property was the same. [ROLFE, B.—It does not follow from that.] The stat. 7 & 8 Geo. 4 authorizes a trial in any county in which possession of the stolen property is shown; and the effect of these statutory provisions is that, in point of law, for the purpose of trial the county in which the offence is committed is extended; and therefore it is unnecessary in the indictment to set out the special jurisdiction. [CRESSWELL, J.—Does the 7th count show to whom the defendant, Martin, was accessory?] I cannot say that it does. [CRESSWELL, J.—Then how can you rely upon the argument that the accessory may be tried wherever the principal may be tried?] It is enough that there was jurisdiction in fact. In *R. v. James* (7 Car. & P. 553), where a prisoner was tried in the county in which he was in custody, by virtue of 1 Will. 4, c. 66, s. 24, it was held that the indictment need not aver the custody in that place. *Loader's case* (Talf. Dickenson, 5th edit., 188; 2 Russ. on Crimes, 122), is to the same effect. That was a case of simple larceny, committed in a parish of Somersetshire entirely detached from it and surrounded by Dorsetshire. The prisoner was committed by a Dorsetshire magistrate to the gaol of that county. The indictment laid the offence to have been committed in the parish in Somersetshire, stating it to be surrounded by Dorsetshire, but did not state that the prisoner was in Dorsetshire, or committed by a Dorsetshire magistrate. It was objected that that should have appeared upon the face of the indictment, in order to bring the case within 2 & 3 Vict. c. 82, s. 1; but Rolfe, B., overruled the objection, and the prisoner was convicted. And in *R. v. Mitchell* (2 Q. B. 636), it was expressly stated, in the judgment of the court, that the statute, authorizing the trial within a county of offences committed within 500 yards of the border (7 Geo. 4, c. 64, s. 12), did not affect the statement of

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venue in the indictment. *Frazer's case* (1 Moo. C. C. 407), which seems an authority the other way, was not argued, and is at variance with the general current of authorities. If the *venue* is only defective, the defect is cured by 7 Geo. 4, c. 64, s. 20; and it must, for this purpose, be assumed that the court has jurisdiction until the contrary be shown: (*R. v. O'Connor*, 5 Q. B. 16, 23, per Patteson, J.) [ROLFE, B.—Here the court appears not to have jurisdiction. WILDE, J.—You cite that case to show that the jurisdiction may be proved *aliunde*; but we know nothing except what appears on the count.] In *R. v. Goff* (Russ. & Ry. C. C. 179), it was held that it need not appear in the indictment that Hants was the adjoining county to Southampton, although the jurisdiction to try, under 38 Geo. 3, c. 52, depended upon that fact. The prisoner cannot be prejudiced, because, if again indicted in the other county, he might plead *autrefois convict*: (11 & 12 Vict. c. 46, s. 2.) [ROLFE, B.—If he had been *duly* tried the first time; but not otherwise. PLATT, B.—It is very difficult for us to conclude that this prisoner was tried by the proper tribunal, when facts have been industriously introduced for the purpose of showing that there was no jurisdiction.]

Judgment of
Wilde, C. J.

WILDE, C. J.—It does not appear to me that there is any reasonable doubt, in this case, that this count cannot be supported. It is necessary that the count should, on the face of it, show the jurisdiction of the court by which it is tried; and that does not mean that all the facts, appearing *aliunde*, which may, in the particular case, be necessary to give jurisdiction in fact, should be stated in the indictment. For the sake of illustration take the case of *R. v. James*. The indictment stated a forgery committed in the county of the city of Gloucester, and it was found by a grand jury of that county; so that, on the face of it, the indictment clearly showed jurisdiction. Then the evidence proved that, in fact, the offence was not committed in Gloucester, but the trial in Gloucester was authorized by a statute, which provided that, under the circumstances, the case was the same as if the offence had been committed in Gloucester. The count showed jurisdiction, but the evidence only supported the count by reason of the effect of the statute; and the court held that the special circumstances need not be averred. In the present case, the indictment charges the prisoner, who was tried in the county of Dorset, with having feloniously received a sheep in the county of Somerset, it not appearing who the thief was, or where the sheep was stolen, or that the prisoner had ever had it in his possession in the county of Dorset, and the acts of Parliament stating only that the receiver of stolen property may be tried in the county where the original theft was committed, or in any county where he may have had possession of the stolen property, or originally received it. Now we have to decide upon a motion in arrest of judgment. We know nothing of the facts; and here an indictment, charging an offence in Somersetshire, is tried in Dorsetshire, without any averment of facts showing jurisdiction in

Dorsetshire. Can we give judgment on such a count? I apprehend that we cannot. The cases which have been cited do not appear to me to touch the point; and as to the argument, that the trial would appear to be proper if certain facts were before us, we may treat those facts as if they existed only in the imagination of the learned counsel who presents them. For these reasons I think the judgment ought to be arrested.

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ROLFE, B.—I am of the same opinion. Mr. *Ffooks* suggested some doubt whether this court had jurisdiction in this case, because the question arose subsequent to the trial and after conviction; but I think there is no ground for that doubt. The word *trial* ought to be taken in a liberal sense; and, in my opinion, includes all the proceedings in the court below. The statute authorizes the court, amongst other things, to amend or arrest the judgment. As to the other point I entirely concur in the judgment already pronounced. Mr. *Ffooks* alluded to a case tried before me in Dorsetshire several years ago: (*R. v. Loader.*) I have no very distinct recollection of the case; but my impression is, that there I thought it unnecessary to aver a commitment for trial in Dorsetshire, because that was only rendered necessary by the facts appearing in evidence, and jurisdiction sufficiently appeared on the face of the indictment.

Judgment of
Rolfe, B.

The other learned judges concurred.

Judgment arrested.

CROWN CASE RESERVED.

April 30, 1849.

(Before WILDE, C. J., ALDERSON, B., WIGHTMAN, J.,
CRESSWELL, J., and PLATT, B.)

REG. v. BEETON. (a)

Stat. 11 & 12 Vict. c. 46, s. 3—Joinder of several counts for receiving, with counts for stealing.

An indictment containing counts for stealing as well as receiving, under sect. 3 of 11 & 12 Vict. c. 46, may have as many counts for receiving as for stealing; and the prosecutor is not bound to elect upon which of the counts for receiving he will rely.

JOHN BEETON was charged at the General Quarter Sessions of the Peace for the county of Suffolk, held by adjournment at Bury St. Edmunds, on the 17th of March, 1849, upon an indictment containing sixteen counts.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

REG.
v.
BRETON.

*Indictment
for Larceny—
Joinder
of Counts for
receiving
and stealing.*

The first nine counts alleged a breaking into and stealing from the dwelling-house, the property being laid differently in each count.

The tenth count stated the breaking and larceny in respect of a building within the curtilage of the dwelling-house.

And the next five counts charged the prisoner with feloniously receiving the stolen property, each of the latter counts being varied to meet the allegations in the first five counts.

The sixteenth count stated a previous conviction.

After the prisoner had pleaded not guilty, and before the case for the prosecution was opened, the counsel for the prisoner objected, that under sect. 3 of 11 & 12 Vict. c. 46, it was made lawful to add one count only for receiving, and that the counsel for the prosecution should therefore be called upon to select upon which of the counts for receiving he would proceed. The court thought that the said section made it lawful to add as many counts for receiving as there were counts charging a stealing, and refused to put the counsel for the prosecution to his election, but reserved a case upon that point for the consideration of this court.

The prisoner was found guilty upon the eleventh count of the indictment and acquitted upon the other counts, and was sentenced to seven years' transportation; execution being respited until the question reserved should have been considered and decided.

Bulwer appeared for the prosecution.

ALDERSON, B.—Is there any doubt about this? Why may there not be as many counts for receiving as stealing? One offence only is stated, but the different counts contain different descriptions of the property.

WILDE, C. J.—We are ready to hear you with great patience; but I believe we are all clearly of opinion that there is nothing in the point.

Conviction affirmed.

CROWN CASE RESERVED.

April 30, 1849.

REG. v. WOOD. (a)

larceny—Animus furandi—Finding and appropriation of lost goods. A man finds goods which have been actually lost, or which he reasonably supposes to have been lost, and takes possession of them, intending to appropriate them entirely to his own use, and there are no circumstances to rebut the presumption that he believed the owner could not be found, he is not guilty of larceny, even though he disposes of them after he has notice of the title of the real owner, for the original taking is lawful, and the subsequent conversion is not a trespass. If, on the other hand, there is reasonable evidence of his belief, at the time of taking them, that the owner could be found, then the original taking is felonious.

THE prisoner was indicted at the summer assizes for the county of Huntingdon, 1848, for stealing a promissory note for the sum of 5*l.*, the property of Samuel Brown. The facts proved, that the governess of the prosecutor dropped the note in a field, which was a country bank note, on the road to Somersham, where the prisoner lived; that the loss being very soon discovered, a reward was made for it, but in vain; and on the following day the prisoner changed the note, and stated that he had found it. On the evening of the loss, and also on the following morning, before the prisoner changed it, the fact of the loss and the particulars of the note were communicated to the prisoner and others.

The jury found that the prisoner did not know, when he picked up the note, who the owner was, but that he did know who the owner was when he changed it. The learned judge (Baron Parke) directed a verdict of guilty to be entered, but discharged the prisoner on his own recognizance, in order that the opinion of the judges might be taken upon the case.

The case was set down for argument in Hilary Term, and was argued by the judges who then composed the court; (b) but counsel were instructed to argue it.

Cur. adv. vult.

BARKE, B., now delivered the judgment of the court.—The prisoner was tried before me at the last summer assizes for the county of Huntingdon for stealing a bank note. It appeared that

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(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

(b) See the statement in the judgment.

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he found the note, which had been accidentally dropped on the high road. There was no name on it indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up, nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally. He then changed it, and appropriated the money to his own use. The jury found that he had reason to believe it to be the prosecutor's property before he thus changed the note. I directed a verdict of guilty, intimating that I should reserve the case for further consideration. Upon conferring with my brother Maule, it seemed to us that the original taking was not felonious, and that in the subsequent disposal of it there was no taking; and therefore I declined to pass sentence, and ordered the prisoner to be discharged, on entering into his own recognizance to appear when called upon. I requested the opinion of the judges, and the case has now undergone much consideration. It was not argued by counsel, but the judges who attended the sitting of this court after the last term, namely, the Lord Chief Baron, my brothers Patteson, Rolfe, Cresswell, Coltman, Williams, and myself, have given it much consideration on account of its importance and the frequency of the occurrence of cases, in some degree similar, in the administration of the criminal law, and the somewhat obscure state of the authorities upon it. In order to constitute the crime of larceny, there must be a taking of the chattels of another *animo furandi*, and against the will of the owner. This is not the full definition of larceny, but so much only of it as is necessary to be referred to for the present purpose. By the term *animo furandi*, is to be understood the intention to take, not a partial or temporary, but the entire dominion over the chattels, without colour of right. As the rule of law, founded on justice, is, that *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend upon the circumstances as they appear to him, and the crime of larceny cannot be committed unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of the owner. In the earliest times it was held that chattels which were apparently without an owner, "*nullius in bonis*," could not be the subject of larceny. Staunford, one of the oldest authorities on criminal law, who was a judge in the reign of Philip and Mary, says, (lib. 1, c. 16), "treasure trove, wreck of the sea, waife, or stray, taken and carried away, is not felony;" "*Quia dominus rerum non apparet, ideo cuius sunt incertum est.*" For this he quotes Fitz. Abr. Coron. pp. 187, 265. These passages are taken from 22 Ass. 99; 22 Edw. 3; 23 Edw. 3; and mention only "treasure trove," "wreck," and "waife;" and Fitzherbert says the punishment for taking such is not the loss of life or limb. The passage in 3 Inst. 108, goes beyond this. Lord Coke mentions three circumstances as material in larceny: First,

the taking must be felonious, which he explains. Secondly, it must be an actual taking, which he also explains. And, thirdly, it must not be by trover; and he then proceeds as follows: "if one lose his goods and another find them, though he convert them '*animo furandi*' to his own use, yet is it no larceny, for the first taking is lawful. So, if one find treasure trove, or waife, or stray" (here "wreck" is omitted and "stray" introduced), "and convert them, *et supra*, it is no larceny, both in respect of the finding, and also for that '*dominus rerum non apparet*.'" The only authority given is that before mentioned (22 Ass. 99; Fitz. Abr. Coron, 265; 22 Edw. 3.) Now treasure trove and waife seem to be subject to a different consideration from goods lost. Treasure trove is properly money supposed to have been hid by some owner since deceased, the secret of the deposit having perished, and therefore belongs to the crown. As to a waife, the original owner loses his right to the property by neglecting to pursue the thief. The very circumstances under which these are assumed to have been taken and converted show that they could not be taken from any one, there being no owner. Wreck and stray are not exactly on the same footing as treasure trove and waife. Wreck is not properly so called if the real owner is known, and it is not forfeited until a year and a day. The word "estrays" is used in the books in different senses, as may be seen in Com. Dig. tit. "Waife," F., where it is used in the sense of cattle forfeited after being in a manor one year and one day without challenge, after being proclaimed, when the property vests in the crown, or its grantee of estrays; and also of cattle straying in the manor before they are forfeited. 2 Blacks. Comm. 561, Steph. edit., defines estrays to be "such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them, in which case the law gives them to the sovereign." In the passage in Staunford, no doubt the word is used not exclusively in the former sense, but generally as to stray cattle not seized by the lord. Now treasure trove and waife, properly so called, are clearly "*bona vacantia, nullius in bonis*," and but for the prerogative would belong to the first finder absolutely. "*Hæc quæ nullius in bonis sunt et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium*."—Bracton. Wreck and stray, in the sense we ascribe to those words, are not in the same situation, for the right of the owner is not forfeited until the end of a year and a day; but Lord Coke, in *Constable's case* (5 Rep. 108, b.), treats wreck also as *nullius in bonis*, and estrays "*animalia vagantia*," he terms "*vacantia*," "because none claims the property." Wreck and stray, however, before seizure, closely resemble goods lost, of which the owner has not actual possession, and afford an analogy to which Lord Coke refers in the passage above cited. Whether Lord Coke means, what the language at first sight imports, that under no circumstances would the taker of goods, really lost and found, be guilty of larceny, is not clear, but the passage is a complete and satisfactory authority that a person who finds goods which are lost may convert them *animo furandi*,

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under some circumstances, so as not to be guilty of larceny. The two reasons assigned by him are, that the person taking has a right in respect of the finding; and also that they are apparently without an owner. *Dominus rerum non apparet*—an owner or *the* owner does not appear. The first of these reasons has led to the opinion that the real meaning of Lord Coke was, not that every finder of lost goods, who takes *animo furandi*, is not guilty of felony, but that if one finds and innocently takes possession, meaning to keep for the real owner, and afterwards changes his mind and converts to his own use, he is not a felon, on the principle that Lord Coke had previously laid down, that “the intent to steal must be when the thing stolen cometh to his possession, for if he hath the possession of it once lawfully, though he hath *animo furandi* afterwards, and carrieth it away, it is no larceny;” and Lord Coke also cites Glanville (lib. 10, c. 13), “*Furtum non est ubi initium habet detentionis per dominum rei.*” It is said, therefore, that the case of finding is an instance of this beginning with lawful title, which, consequently, cannot become a felony by subsequent conversion; but that if it be originally taken not from the true owner, but with intent to appropriate it to his own use, it is a felony, and of this opinion the Commissioners for the Amendment of the Criminal Law appear to have been, as stated in their first report. This opinion appears not to be well founded, for Lord Coke puts the case of lost goods on the same footing as waife and treasure trove, which are really *bona vacantia*, goods without an owner, and with respect to which we apprehend that a person would not be guilty of larceny, though he took originally *animo furandi*, that is, with the intent not to take a partial or temporary possession, but to usurp the entire dominion over them; and the previous observations have reference to cases in which the original possession of the chattel stolen is with the consent of, or by contract with, the owner. But any doubt on this question is removed by what is said by Lord Hale (1 Hale P. C. 505): “If A. finds the purse of B. in the highway, and take and carry it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying or secreting it, yet it is not felony. The like in case of taking a wreck or treasure trove, (citing 22 Ass. 99,) or a waife or stray.” Lord Hale clearly considers, that if lost goods are taken originally *animo furandi* in the sense above mentioned, the taker is not a felon; and, when it is considered that by the common law larceny to the value of above 12d. was punishable by death; and that the quality of the act in taking *animo furandi* goods from the possession of the owner differs greatly from that of taking them when no longer in his possession, and *quasi derelict*, as respects its injurious effects on the interests of society—the true ground for the punishment of crime—it is not surprising that such a rule should be established, and it is founded on strict justice, for the cases of abstraction of lost property are of rare occurrence when compared with the frequent violation of property in the possession of an owner: there was no need of so severe a sanative, and the

civil remedy might be deemed amply sufficient. Hawk. b. 1, c. 33, a. 3, says "our law which punishes all theft with death, if the thing stolen be above the value of 12*d.*, and with corporal punishment if under, rather chooses to deal with such cases as civil than criminal offences, perhaps for this reason, in the case of goods lost, because the party is not much aggrieved where nothing is taken but what he had lost before." It cannot indeed be doubted, that if at this day the punishment of death was assigned to larceny, and usually carried into effect, the appropriating of lost goods would never have been held to constitute that offence, and it is certain that the alteration of punishment cannot alter the definition of the offence. To prevent, however, the taking of goods from being larceny, it is essential that they should be presumably lost, that is, that they should be taken in such a place and under such circumstances as that the owner would be reasonably presumed by the taker to have abandoned them, or at least not to know where to find them. Therefore if a horse is found feeding upon an open common, or on the side of a public road, or a watch found apparently hidden in a hay stack, the taking of these would be larceny, because the taker had no right to presume that the owner did not know where to find them, and consequently had no right to treat them as lost goods. In the present case there is no doubt that the bank note was lost; the owner did not know where to find it; the prisoner reasonably believed it to be lost; he had no reason to know to whom it belonged, and therefore though he took it with the intent not of taking a partial or temporary, but the entire dominion over it, the act of taking did not in our opinion constitute the crime of larceny. Whether the subsequent appropriation to his own use, by changing it with the knowledge at that time that it belonged to the prosecutor, does amount to that crime will be afterwards considered. It appears, however, that goods which do fall within the category of lost goods, and which the taker justly believes to be lost, may be taken and converted so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, as if there is any mark upon them presumably known by him, by which the owner can be ascertained. Whether this is a qualification introduced in modern times, or which always existed, we need not determine. It may have proceeded on this rule:—"quia dominus rerum non apparet ideo cuius sunt incertum est," and the rule is held not to apply when it is certain who is the owner; but the authorities are many, and we believe this qualification has been so generally adopted in practice that we must therefore consider it to be the established law. There are many reported cases on this subject. Some, where the owner of the goods may be presumed to be known from the circumstances under which they are found; amongst these are mentioned the cases of articles left in hackney coaches by passengers, which the coachman appropriated to his own use, or a pocket-book found in a coat sent to a tailor to be repaired, and abstracted and opened by him. In these cases the appropria-

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tion has been held to be larceny. Perhaps these cases might be classed amongst those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretence to consider them abandoned or derelict: (*Lamb's case*, 2 East P. C. 664; *Wynne's case*, 1 Leach, 168; *Sear's case*, Ibid. *in notis*.) Some appear to have been decided on the ground of bailment determined by breaking bulk, which would constitute a trespass, as *Wynne's case*; but it seems difficult to apply that doctrine, which belongs to bailment, where a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding. The appropriation of goods by the finder has also been held to be larceny where the owner could be found out by some mark on them, as in the case of lost notes, cheques, or bills with the owner's name upon them. This subject was considered in the case of *Merry v. Green* (7 M. & W. 623), in which the Court of Exchequer acted upon the authority of these decisions; and in the argument in that case difficulties were suggested, whether the crime of larceny could be committed in the case of a marked article, a cheque, for instance, with the name of the owner on it, where a person originally took it up, intending to look at it and see who was the owner, and then, as soon as he knew whose it was, took it *animo furandi*, as in order to constitute a larceny the taking must be a trespass; and it was asked when in such a case the trespass was committed? In answer to that inquiry the dictum attributed to me in the report was used, that in such a case the trespass must be taken to have been committed, not when he took it up to look at it, and see whose it was, but afterwards, when he appropriated it to his own use *animo furandi*. It is quite a mistake to suppose, as Mr. Greaves has done (*Russ. on Crimes*, vol. 2, p. 14), that I meant to lay down the proposition in the general terms contained in the extract from the report of the case in 7 M. & W. 629, which, taken alone, seems to be applicable to every case of finding unmarked as well as marked property; it was meant to apply to the latter only. The result of these authorities is, that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriate them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would

probably be presumed that the taker would examine the chattel, as an honest man ought to do, at the time of taking it, and if he did not restore it to the owner, the jury might conclude that he took it when he took complete possession of it *animo furandi*. The mere taking of it up to look at it would not be a taking possession of the chattel. To apply these rules to the present case. The first taking did not amount to larceny, because the note was really lost, and there was no mark on it nor other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner would not be found, and therefore the original taking was not felonious. And if the prisoner had changed the note, or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note the owner became known to him, and he then appropriated it *animo furandi*; and the point to be decided is, whether that was a felony: upon this question we have felt considerable doubt. If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not; it was punishable, as we have already decided, and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case more than the others, and consequently no larceny. We therefore think the conviction was wrong.

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Conviction reversed.

CROWN CASE RESERVED.

June 23, 1849.

REG. v. JOHN RADLEY. (a)

Indictment—Allegation of property—Description of current coin as goods and chattels—Surplusage.

An indictment charged a larceny of "two pieces of the current silver coin of the realm called shillings, of the goods and chattels of A. B." Held, that though "goods and chattels" was an incorrect description of money, those words might be rejected as surplusage, and that then there was a sufficient allegation that the money belonged to A. B."

Case.

AT the adjourned Epiphany Quarter Sessions, holden at Chelmsford, in and for the county of Essex, John Radley was convicted of felony, subject to the opinion of the judges upon the following case:—

The indictment against him alleged that "John Radley, late of the parish of Stifford, in the county of Essex, labourer, on the 3rd day of February, A.D. 1849, with force and arms, at the parish aforesaid, in the county aforesaid, two pieces of the current silver coin of this realm called shillings, of the value of two shillings, of the goods and chattels of Samuel Fitch, then and there being found, feloniously did steal, take and carry away, against the peace of our lady the Queen, her crown and dignity."

It was objected that the indictment was defective in not stating to whom the shillings alleged to be stolen belonged, the words "of the goods and chattels of Samuel Fitch," being insensible as applied to money.

The court respited the judgment in order that the opinion of the judges might be taken upon the validity of the objection.

No counsel were instructed to argue the case; but it stood for argument on the 30th of April following, and was considered by the judges, Wilde, C.J., Rolfe, B., Cresswell, J., Platt, B., and Williams, J.

Cur. adv. vult.

Judgment.

WILDE, C.J. now delivered the judgment of the court.—The prisoner in this case was convicted at the last Epiphany Sessions at Chelmsford, for having stolen two shillings from Samuel Fitch, when a case was reserved for the opinion of the judges upon an objection to the indictment. The indictment charged the prisoner with having stolen two pieces of current silver coin of the realm called shillings, of the value of two shillings, of the goods and

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

chattels of Samuel Fitch. It was objected on the part of the prisoner that the indictment is inconsistent and bad in charging the shillings, the current coin of the realm, to be goods and chattels; and as that is the property stolen, and no other property is alleged to be stolen, described under the terms "goods and chattels," the indictment cannot be sustained. This case has been considered, and we are of opinion that the objection cannot be sustained, and that the indictment is sufficient. It may be true that money does not correctly come within the technical definition of goods and chattels (*Rex v. Guy*, 1 Leach, 208, and *Rex v. Morris*, 1 Leach, 368), as is also stated in Foster's Crown Law, 79 (a); but it is unnecessary to enter into the consideration of that question. This indictment charged the prisoner with having stolen two pieces of the silver coin of the realm called shillings, which is an accurate description of the property stolen. We think in reading the indictment the words "goods and chattels" ought to be rejected as surplusage; then as the charge in the indictment is that the prisoner stole two pieces of current silver coin of the realm of the value of two shillings of Samuel Fitch, which is a sufficient allegation that the coin stolen was the property of Samuel Fitch (b), we think it is immaterial that the current coin of the realm was afterwards inaccurately described as goods and chattels; the conviction therefore is proper.

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catalla.*

Judgment.

Conviction affirmed.

(a) Fost. Cr. L. 79. "But it hath been very rightly holden that money is not within the act (10 & 11 Will. 3, c. 23, &c.) the words being 'goods, wares and merchandizes,' for although the word *goods* may in a large sense take in money, and often doth, yet being connected with wares and merchandizes, the safer construction of so penal a statute will be to confine it to goods *ejusdem generis*, goods exposed to sale;" and reference is there made to 1 P. Wms. 267, 3 P. Wms. 112; and to a case of *Geo. Grimes*, indicted at Maidstone Lent Assizes, 1752, upon stat. 24 Geo. 2, c. 45. (See *R. v. Grimes*, 2 East P. C. 646. See also *R. v. Leigh*, 1 Leach, 50; *R. v. Thomas Mills*, ib. 43.)

(b) See contra, *Longs case*, Cro. Eliz. 490, cited in Hawk. P. C. lib. 2, c. 25, s. 71. William Long was indicted at Norwich, of the felonious stealing of a piece of linen cloth. The indictment was removed by *certiorari* and several exceptions taken. The 1st and 2nd were overruled. The 3rd was as follows: "Because the indictment is *quod felonice furatus fuit quandam peciam panni linei cujusdam A. N. &c.*, and doth not say *de bonis et catallis cujusdam A. N.*, as the common form of the precedents is, and therefore ill; for an indictment ought to be certain to every intent without any intendment to the contrary; and here it may be that this piece of linen was not the goods and chattels of A. N. at the time of the taking of them, but by him let out, or delivered, or pledged to another; and it ought to have been shown whose *bona et catalla* they were, &c. And the court held it to be a material exception for the reasons aforesaid; and for that cause the indictment was discharged by the whole court, *Gawdy absente*, and restitution awarded to the party for his goods seized for that cause." The indictment there was in the precise form of the indictment in the present case after rejecting the words "of the goods and chattels."

CROWN CASE RESERVED.

June 23, 1849.

REG. v. JOHN PASCOE. (a)

7 & 8 Geo. 4, c. 29, s. 58—*Receiving reward for helping to stolen goods, without bringing the thieves to justice—What is a corrupt receiving.*

Upon the trial of an indictment under 7 & 8 Geo. 4, c. 29, s. 58, which charged the corrupt receiving of money as a reward for helping to stolen goods, it was proved that the house of the prosecutrix had been robbed of cheeses, that the prisoner called upon her, and told her that he had some suspicion of the persons who had committed the robbery; that he proposed and executed a plan by which he brought to her house the persons whom he suspected, and the prosecutrix recognized them as persons who had been in her house the day before the robbery. She then said that she wished he could buy a bit of cheese of them, to which the prisoner assented; and received 3l. for the purpose. The jury found that the prisoner knew the thieves, and assisted the prosecutrix at her request in endeavouring to purchase from them the stolen property, not meaning to bring them to justice.

Held, that he "corruptly received" the money within the meaning of the statute.

Case.

AT the last Warwick Assizes, L. C. Humfrey, Q.C., reserved the following case:—The prisoner was indicted under the stat. 7 & 8 Geo. 4, c. 29, s. 58, for that he corruptly and feloniously did take and receive of and from Hannah Turley certain money and reward, to wit, three sovereigns, under pretence and upon account of then and there helping the said Hannah Turley to certain goods and chattels, to wit, fourteen cheeses, which said goods had been before feloniously stolen, he the said John Pascoe not having caused the persons by whom the said goods had been so stolen to be apprehended and brought to trial for the same. The prisoner was tried before me at the last assizes for the county of Warwick. The facts of the case were these. The prosecutrix had had her house broken open, and fourteen cheeses stolen. The prisoner, who was a tradesman employed by the prosecutrix, called upon her in the course of his business, and told her that he had some suspicion of the persons who had broken open her house. He proposed and executed a plan by which he brought to her house the persons he suspected of being concerned in the robbery; and, upon the prosecutrix seeing them, she at once recognized them as persons who had been in her house on the day previous to the night on which the robbery was effected. The prisoner asked the prosecutrix if she did not think they were implicated in the robbery: she said, "Yes;" he said, "So do I." She said, "I

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

wish you would try if you could buy a bit of cheese of them; to which he assented, and she gave him 3*l*. for that purpose. The prosecutrix saw the prisoner several times, when he told her that the cheese would come. The prosecutrix said, "You have got the money, and you don't mean to send me the cheese." He said she might have the money back again whenever she pleased. I left to the jury three questions. First, did the prisoner mean to screen the guilty parties, or to share the money with them? in which case I thought he was within the meaning of the statute. Secondly, did the prisoner know the thieves, and intend to assist them in getting rid of the cheese, by procuring the prosecutrix to buy it? in which case, also, I thought he was within the statute? Thirdly, did the prisoner know the thieves, and assist the prosecutrix, as her agent, and at her request, in endeavouring to purchase the stolen property from them, not meaning to bring the thieves to justice? To the first two questions the jury answered, "No;" to the third, "Yes." I directed the jury to find the prisoner guilty, reserving for the consideration of the judges the question whether the receipt of the money under the circumstances was a corrupt receiving within the meaning of the statute. I directed the prisoner to be kept in custody, that the opinion of the judges might be taken whether the conviction is right.

The case stood for argument in last Easter Term (April 30), before Wilde, C. J., Rolfe, B., Cresswell, J., Platt, B., and Williams, J., but no counsel were instructed.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.—In this case the prisoner was convicted at the last assizes for the county of Warwick, before Mr. Humfrey, upon an indictment framed under the stat. 7 & 8 Geo. 4, c. 29, s. 58, when a case was reserved for the opinion of the judges, which stated the prisoner to have been indicted for corruptly and feloniously taking and receiving of and from Hannah Turley certain money and reward, to wit, three sovereigns, under pretence and on account of then and there helping the said Hannah Turley to certain goods and chattels, that is to say, fourteen cheeses, which goods had been before feloniously stolen, he, Pascoe, not having caused the persons by whom the goods had been so stolen to be apprehended and brought to trial. The facts were, that the prosecutrix had had her house broken open, and fourteen cheeses stolen: the prisoner, who was a tradesman employed by the prosecutrix, called upon her, and told her that he had some suspicion of the persons who had broken open her house, and he proposed and executed a plan by which he brought to the house the persons whom he suspected had been concerned in the robbery, and the prosecutrix, upon seeing them, at once recognized them as persons who had been in her house on the day previous to the night upon which the robbery was effected. The prisoner asked the prosecutrix if she did not think they were implicated in the robbery: she said "Yes;" he said, "So do I;"

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Judgment.

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Judgment.

and she said "I wish you would try to buy a bit of cheese of them;" to which he assented, and she gave him 3*l*. for the purpose. The prosecutrix saw the prisoner several times, and said "You have got the money, and don't mean to send the cheese," and he said she might have the money back again, but he never gave it to her. Three questions were left to the jury. First, did the prisoner mean to screen the guilty parties, or to share the money with them? in which case they were told the case was within the meaning of the statute. Secondly, did the prisoner know the thieves, and intend to assist them in getting rid of the cheese by procuring the prosecutrix to buy it? in which case they were told the case was within the statute. And, thirdly, did the prisoner know the thieves, and assist the prosecutrix as her agent and at her request in endeavouring to purchase the stolen property from them, not meaning to bring the thieves to justice? To the first and second questions the jury answered "No," and to the third "Yes." The jury were then directed to find the prisoner guilty, reserving for the consideration of the judges the question whether the receipt of the money under the circumstances was a corrupt receiving within the meaning of the statute; and the prisoner was kept in custody, subject to the opinion of the judges. This case has been considered by the court, and we are of opinion, upon the facts found by the jury, that the receipt of the money by the prisoner was a corrupt receiving of such money within the meaning of the statute, the facts found being that the prisoner knew the thieves, and assisted the prosecutrix in endeavouring to purchase the stolen property from them, not meaning to bring them to justice. This finding establishes all the facts necessary to constitute the offence described in the statute. The words are, "and be it enacted, that every person who shall corruptly take any money or reward directly or indirectly, under pretence or on account of helping any person to any chattel, money, valuable security, &c., which shall, by any felony or misdemeanor, have been stolen, taken, obtained, or converted as aforesaid, shall, unless he cause the offender to be apprehended and brought to trial for the same, be guilty of felony." We think the conviction, therefore, was legal and proper.

Conviction affirmed.

CROWN CASE RESERVED.

June 23, 1849.

REG. v. HARRIET LANGBRIDGE.

Deposition of witness on criminal charge—Caption—Admissibility.

On the trial of an indictment for false pretences, a witness being ill, a deposition, taken before the committing magistrate, was tendered in evidence. The caption of that deposition stated that it was taken before the committing magistrate in the presence of the prisoner, on a charge of obtaining money, and valuable securities for money, from M. R.; saying illegally or by false pretences. It was objected that it was inadmissible, because no offence was shown to have been charged. It was held that it was admissible; as it sufficiently appeared from the examination itself, that it related to the charge upon which the prisoner was being tried.

At the General Quarter Sessions of the Peace of our Lady Case. the Queen, held at the castle of Exeter, in and for the County of Devon, aforesaid, on Tuesday the 20th day of February, 1849, Baldwin Fulford, Esq., Montague Baker Bere, Esq., and their companions, justices, &c.

Harriet Langbridge was indicted for unlawfully obtaining, by means of false pretences, from Mary Rowe, one promissory note payable to the order of the said Mary Rowe, for the sum of 50*l.* and interest, and of the value of the property of Charlotte Rowe, with intent to cheat and defraud the said Charlotte Rowe of the same.

On the trial of the prisoner the deposition of Mary Rowe was taken in by the counsel for the prosecution. Proof was given that the deposition was taken by the committing justice in the presence of the prisoner, and that she had a full opportunity of cross-examining and questioning the witness; that it was signed by William Ponsford Clerk, the justice before whom the same purports to have been taken; and that the said Mary Rowe was at the time of the deposition ill as not to be able to travel.

The charge preferred before the committing justice was, that the prisoner had obtained the promissory note, and other valuable securities, by means of false pretences. And of this charge the prisoner was informed by the committing justice.

The caption of the deposition of the said Mary Rowe is as follows:—

On oath, to wit.—The examination of Mary Rowe, wife of John Squire Rowe, of Thornbury Farm, in the parish of Hittisleigh, in the county of Devon, taken on oath this 14th day of February, in the year of our Lord 1849, at Hittisleigh, in the County of Devon, aforesaid, before the undersigned William Ponsford Clerk,

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one of Her Majesty's justices of the peace for the said county, in the presence and hearing of Harriet Langbridge, late of Moreton-hampstead, in the said county, wife of John Langbridge of the same place, labourer, who is now charged before me for obtaining money, and one valuable security for money, from the said Mary Rowe, the money then and there being the money of the said William Squire Rowe, and the said valuable security for money being then and there the property of one Charlotte Rowe.

It was objected, on behalf of the prisoner, that the charge thus set forth in the said caption, is obtaining money and valuable securities for money, but whether legally or illegally is not stated, and no offence is therefore shown; and that the deposition of Mary Rowe was, consequently, not receivable in evidence. The court, however, received it in evidence, subject to the question whether, under the circumstances, it ought to have been so received.

The prisoner was found guilty and sentenced to be transported for seven years, but execution of the sentence was respited until the said question is decided by the judges.

There was not sufficient evidence to warrant a conviction, without the deposition of the said Mary Rowe.

In this case an application was made (April 30), to allow it to stand over, in order to afford time to instruct counsel to argue, on the part of the prisoner, counsel having been instructed on the part of the prosecution only; but the application being refused, no argument was offered, and the case was considered by the same judges as the two preceding cases.

Cur. adv. vult.

Judgment.

WILDE, C. J., now delivered the judgment of the court. — The prisoner, in this case, was convicted at the Devon Quarter Sessions for having unlawfully obtained from Mary Rowe a promissory note for 50*l.*, under a false pretence; when a case was reserved for the opinion of the judges. (After stating the facts and the form of the caption as above, his lordship proceeded):—Counsel for the prisoner objected to the deposition being read in evidence, on the ground that the title or caption of the examination did not state that the prisoner was charged with *unlawfully* obtaining the money, or valuable security for money, and that, therefore, no offence was charged, or it was doubtful what the offence charged was; consequently the deposition was inadmissible in evidence. The question reserved for the opinion of the judges was, whether the objection so taken on behalf of the prisoner was a valid objection, and rendered the deposition inadmissible in evidence. The judges are of opinion that the objection was not valid, and that the deposition was properly received in evidence. The objection is not that the evidence, as set forth in the examination, does not sufficiently appear to relate to the charge upon which the prisoner was being tried, so as to warn and apprise her of the matter to which her cross-examination should be directed, but only that the title of the examination was not a sufficient description of the charge against her. The title of the

deposition stated the occasion of its being taken, and the matter referred to; and we think there is no authority for requiring any title or caption of the deposition, and that it is sufficient if the examination of the witness shows in the body of it that the evidence, as stated, refers to the charge on which the prisoner was put on trial; and, as no objection was raised to the deposition on this ground at the trial, we think it was properly received in evidence. It may not, however, be improper here to observe that, in this particular case, the charge preferred against the prisoner was that of obtaining a promissory note, or security for money, by means of a false pretence, and that the prisoner, at the time of the examination, was informed of that charge by the committing magistrate, and had a full opportunity of cross-examining the witness.

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Conviction affirmed.

CROWN CASE RESERVED.

June 2, 1849.

(Before LORD DENMAN, C. J., PARKE, B., PATTESON, J.,
COLTMAN, J., and WILLIAMS, J.)

REG. v. JOHN MATTOCKS CHAPMAN. (a)

Misdemeanor—False swearing and personation for the purpose of obtaining a marriage licence—Perjury—Authority of surrogate to administer an oath—Judicial proceeding.

It is a misdemeanor at common law to make a false statement upon oath before a surrogate in order to obtain a marriage licence.

Quere, whether it is perjury.

An indictment charged that A. B. went before a surrogate, and with intent to deceive the surrogate, and obtain from him a marriage licence, swore (the said surrogate having authority to administer the said oath to the said A. B.), that his name was C. D., that he was a widower, and one of the parties for whom the licence was obtained, and that the woman had had her usual place of abode for the space of fifteen days within the parish in which the marriage was to be celebrated, whereas his name was not C. D., &c. (negating all the statements); and that by the said false oath the said A. B. fraudulently obtained the marriage licence.

Held, that this was a good count for misdemeanor, without averring a marriage had, or intention to procure a marriage; that the allegation of authority in the surrogate to administer the oath did not mean authority to administer an oath upon which, if false, perjury could be assigned, but was supported by the general authority of the surrogate

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

to administer the oath in such cases; and that the indictment was supported by proof that any one of the statements made on oath was false.

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Indictment.

THE prisoner was tried and convicted before Lord Denman, C. J., at the last Taunton Assizes, but judgment was respited in order that the opinion of the judges might be taken upon the following case:—

The prisoner was tried before me at the last Spring Assizes for Taunton, upon an indictment for perjury, which stated in the

1st Count.—That William James, clerk, was a surrogate for the diocese of Bath and Wells having authority to grant licences for marriages therein, and that one John Mattocks Chapman, of the city of Wells aforesaid, in the county aforesaid, applied to the said surrogate to grant a licence for the solemnization of a marriage at Wilton, between Joseph Baker and Sarah Fry, and that said Chapman, unlawfully intending to deceive said James as such surrogate, and to obtain from him such licence in fraud and violation of provisions of 4 Geo. 4, did, for the purpose of obtaining from said surrogate such licence, wilfully, fraudulently, and unlawfully produce before said James an affidavit in writing, and before said surrogate, in due form of law, was sworn and took his oath upon the Gospel concerning the truth of the matters therein (the said James having lawful and competent authority as such surrogate to administer the said oath to the said Chapman in that behalf), and that said Chapman, being so sworn before said James, having such authority as aforesaid, did, for the purpose of obtaining such licence for the marriage of the said Baker with said Fry, falsely, corruptly, knowingly, wilfully, fraudulently and unlawfully, in and by said affidavit, depose and swear (*inter alia*) in substance and to the effect following (that is to say), that the name of him, Chapman, was Joseph Baker, and that he was one of the parties for whose marriage a licence was applied for; that he was a yeoman and a widower, and that said Sarah Fry had had her usual place of abode in said parish of Wilton for fifteen days then last. Whereas his name was not Baker, he was not one of the parties for whose marriage a licence was obtained, not a yeoman, not a widower; and said Fry had not had her usual place of abode in said parish for fifteen days then last. All of which premises were to said Chapman well known. By means of which said false oath, so falsely, &c., taken as aforesaid, said Chapman did unlawfully obtain from said surrogate a licence for the solemnization of a marriage at the parish of Wilton, in said county and diocese, between said Baker and Fry, the said James at the time believing the said oath to be true.

First count.

Second count.

2nd Count.—Similar to 1st, except that it lays the intent as unlawfully intending to deceive James as such surrogate, and fraudulently to obtain from him such licence, and then goes on to state that Chapman, for the purpose of obtaining such licence from said surrogate as aforesaid in due form of law, was sworn, and took his oath upon the Gospel. And that Chapman, being so sworn before said James (said James having a lawful and com-

petent power and authority as such surrogate to administer the said oath), did, for the purpose (as in 1st count), falsely, &c., swear (*inter alia*.) (The rest of the count same as 1st.)

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3rd Count.—Says that the intent was unlawfully intending to obtain from said James, as such surrogate, such licence, in fraud and violation of 4 Geo. 4. (The rest the same as 2nd count, except that it does not state the oath to be by affidavit.)

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Third count.

4th Count.—The same as the 3rd, except that it states that Chapman, being sworn before said James (having a lawful and competent jurisdiction and authority as such surrogate to administer the said oath), did, &c., but it does not state that the licence was obtained.

Fourth count.

5th Count.—That James was a surrogate, having authority to grant licences; that Chapman applied, as in 1st count. That Chapman, for the purpose of obtaining from James as such surrogate such licence, then and there before said James as such surrogate, in due form of law, was sworn and took his oath upon the Gospel. That Chapman, being so sworn before said James (James having lawful and competent power and authority as such surrogate to administer the said oath), did, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully and unlawfully, before said James swear (*inter alia*) in substance and to the effect following, that is to say, (as in the previous counts); and so, that said Chapman before said surrogate (the said James having such authority) by his own act, &c., and of his own wicked and corrupt mind, &c., falsely, &c., did commit wilful and corrupt perjury, &c.

Fifth count.

It was proved that the prisoner went before Mr. James, a surrogate for the diocese of Bath and Wells, to obtain a licence; that the several facts stated and recited in the affidavit set out below were then taken down from the dictation of the prisoner, and the affidavit signed by him. That an oath was then administered to him in the presence of Mr. James, and he was asked if his name was Joseph Baker, and if the signature was his, to which he said "Yes." That the affidavit was then read to him, and he was asked if the contents of it were true, to which he said "They are." That the said several facts were false to the knowledge of the prisoner at the time he so dictated them; that Mr. James then gave him the licence mentioned in the affidavit.

Evidence.

The following is a copy of the affidavit above referred to:—

"Diocese of Bath and Wells.—On the 27th day of July, 1848, appeared personally Joseph Baker, of the parish of Bishop's Hull, in the county of Somerset, yeoman, a widower, and prayed a licence for the solemnization of matrimony in the parish church of Wilton, in the county aforesaid and diocese of Bath and Wells, between him and Sarah Fry, of the parish of Wilton aforesaid, a spinster of the age of twenty-one years and upwards, and made oath that he believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court to bar or hinder the proceeding of the said matrimony according to the tenor of such licence. And he further

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made oath that she hath had her usual place of abode within the parish of Wilton aforesaid, for the space of fifteen days last past.

“JOSEPH BAKER.

“Sworn on the same day before me,

“WILLIAM JAMES, surrogate.”

At the close of the case for the prosecution the counsel for the prisoner objected that the allegations in the indictment were not sustained by the evidence.

1st. That the instrument was not in form an affidavit, as it used the words “made oath,” instead of “maketh oath.”

2nd. That the names, residence, &c., in the affidavit mentioned were mere description and not assertion (*Balfour v. Carpenter*, 1 Phill. 204.)

3rd. That the surrogate had not competent authority to administer the oath to the prisoner.

4th. That the indictment disclosed no offence known to the law. The prisoner was found guilty.

I request the opinion of the learned judges upon this case.

Phinn for the
prisoner.

Phinn, for the prisoner.—1. The 5th count of the indictment was not sustained by the evidence; because the affidavit produced does not show that the prisoner made upon oath the statement alleged in the indictment. It is in the past tense (*Howorth v. Hubbersty*, 3 Dowl. 455); and all that which is descriptive of the party swearing is not included in the oath. It does not appear that the prisoner swore that he was Joseph Baker, or that he was a widower, or that he was one of the parties for whom the licence was obtained. 2. It was not proved either in law or fact that the surrogate had power to administer this oath to this person. From the time of Lord Holt it has been a moot point whether perjury can be assigned upon a false statement in the Ecclesiastical Court; it has been denied even in regard to matters of contentious jurisdiction; but with regard to matters of voluntary jurisdiction there really is very little doubt that perjury cannot be assigned in such cases. Now, the granting of marriage licences is part of the voluntary jurisdiction of the Ecclesiastical Court; and the count for perjury, therefore, cannot be sustained. Before 1603, no oath was required as a condition precedent to the granting of those licences; the 103rd canon of that year imposes that condition; and that canon is by s. 14 incorporated into 4 Geo. 4, c. 76. (He referred to Gibs. Cod. 424; Strype's Whitg. vol. 3, p. 380.) That act of Parliament, however, contains no clause making it perjury to take a false oath before the surrogate, although in the 3 Geo. 4, c. 75, there was such a provision (s. 10). Perhaps the effect of the statute would be to make it perjury, if the party who took the false oath was one of the parties for whom the licence was obtained; but in this case the oath was administered to a person who was not one of the parties for whom the licence was obtained; and the statute, therefore, gave the surro-

gate no authority to administer the oath to the prisoner. If the statute gave no authority, then the *vexata questio* as to the jurisdiction of the Ecclesiastical Court arises; and the result of the authorities is that perjury cannot be assigned upon a false affidavit made at Doctors' Commons for the purpose of obtaining a licence. In *The Bishop of St. David's v. Lucy* (1 Ld. Raym. 447, 451), it is said "in case of perjury, if it be committed in a cause of which the spiritual court has cognizance, as matrimony, &c., they shall proceed in the spiritual court to punish it; otherwise, where it is committed in matter of contracts, &c. (Keilw. 39; 2 Hen. 4, 10.) And per Holt, C. J., 'it has been a question whether perjury in the spiritual court can be tried here; and in all the cases where it has been, the persons have been acquitted, and so it has been ended, but it is not yet settled.'" In *R. v. Alexander* (1 Leach, 63), the question whether a false oath taken in Doctors' Commons for the purpose of obtaining a marriage licence amounts to perjury was submitted to the judges, and several times agitated; but not decided, as the prisoner died in Newgate. In *Woodman's case* (1 Leach, 64, note (a),) the same question was raised, but no decision communicated; but in *Rex v. Forster* (Russ. & Ry. 459), upon a case reserved, the judges were unanimous that upon a false affidavit sworn before a surrogate for the purpose of obtaining a marriage licence perjury could not be assigned. Further, in *R. v. Verelst* (3 Camp. 432), upon an indictment for perjury committed in a divorce suit in the Ecclesiastical Court, the defendant was acquitted, although Lord Ellenborough held that the fact of the person who administered the oath having acted as a surrogate was sufficient *primâ facie* evidence of his being duly appointed, and having authority to administer the oath. (He also referred to *Sanchez de Matrimonio* (lib. 3, disp. 8, 13), and *Lascardus* there cited, in order to show that the granting of marriage licences was a matter of voluntary and not contentious jurisdiction.) If the oath is administered ministerially, and not in any judicial proceeding, it requires a statutory provision to make the falsehood perjury: (see the statutes collected, 2 Russ. on Crimes, 606, *et seq.*) 3. As to the first four counts of the indictment, the objection arising upon the form of the affidavit applies to them. [PATTESON, J.—The 3rd count does not state that the perjury was committed in an affidavit.] No; but the affidavit produced is the evidence of what the prisoner swore. The description of the person and circumstances of the swearer is no part of the oath: (*Ewing v. Wheatley*, 2 Hagg. Consist. R. 183; *Balfour v. Carpenter*, 1 Phill. 204.) It is immaterial for the purpose; because a licence obtained in a false name is binding: (*Cope v. Burt*, 1 Hagg. Consist. Rep. 434.) [PARKE, B.—The allegation is, that he swore three distinct things; and it is quite clear that he swore one of them, and swore falsely. Surely that is enough.] To constitute the crime of perjury; but the misdemeanor consists in obtaining a licence by making a false statement on oath; and the whole of the false statement must be proved, because the surrogate

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would not have granted the licence unless all the false statements had been made. [PARKE, B.—One false statement is a step taken towards the commission of a misdemeanor, and is therefore itself a misdemeanor. It no longer rests in mere intention. PATTESON, J.—This is a case of personation; the prisoner obtains a licence by personating one of the parties for whom it was obtained.] If the indictment had been so framed the case would have been one of greater difficulty; but the word “personate” nowhere appears in the indictment, and it is *vocabulum artis*. If that is not so, and a charge of personation can be collected from these counts, it is questionable whether that is a misdemeanor at common law. Personation of bail was punishable as a contempt of court. In 2 East, P. C. 1010, it is said that it is also punishable as a misdemeanor, but the cases cited do not fully bear out that proposition, and that offence has been made felony by stat. 1 Will. 4, c. 66, s. 11. But, further, these counts all contain the averment that the surrogate had power and authority to administer the said oath to the said person. [LORD DENMAN, C. J.—Is there any doubt that he had? If a person comes to the surrogate and represents himself as one of the parties to whom the surrogate is authorized to administer the oath, must not the surrogate administer it? The surrogate can know nothing of the persons who come to him, except from their own statement; and can it be made a reason for saying that he had no authority to administer the oath, because the party who takes it has deceived him as to the facts?] Abstractedly, the surrogate had no power to administer the oath; relatively to the prisoner's conduct, perhaps he had; but, lastly, it is no misdemeanor to make a false statement upon oath, and thereby obtain a licence. The indictment should have gone on to allege that a marriage was had, or that the licence was obtained with intent that a marriage should be had. The want of those averments deprives the fraud of that character of public concernment which would make it a misdemeanor. In *R. v. Forster* the indictment could not be sustained for want of that statement. In this case the indictment does not even state that the licence was in writing. Proof of a mere parol licence would have satisfied the averment.

Fitzherbert, contra.—As to the form of the affidavit, it was proved that the prisoner swore that the contents of the paper were true; and at all events one false statement is enough (*R. v. Jones*, 2 B. & Ad. 611); but the main question is, whether the allegation that the surrogate had authority to administer the oath is sustained. That authority does not depend upon the 4 Geo. 4, c. 76, s. 14; but upon the necessity of the power for the exercise of the duty cast upon the surrogate. The canons of 1603 are always treated as declaratory of the then state of the ecclesiastical law (*R. v. Verelst*, cited *supra*); and by the 103rd canon of 1603 this oath is required to be administered. The surrogate acts in this matter as an ecclesiastical judge; and he has a right to administer such oaths as are necessary to satisfy his own conscience; for the granting of licences is a matter of contentious jurisdiction. The authority of

Sanchez has been much questioned: (Bayle's Dict. 2667, n. B.) Sect. 11 of 4 Geo. 4, c. 76, provides, that no licence is to be granted where a *caveat* is entered, until the judge has determined the matter. (He referred to *R. v. Becke*, Stra. 1160; *R. v. Lewis*, *ib.* 70; *Shaw v. Thompson*, Cro. El. 609; *Plaice v. Howe*, Cro. El. 185; none of which were cited in *R. v. Forster*.) [LORD DENMAN, C. J.—There may be a great deal in your present argument; but is it necessary for your purpose, when you have a very clear case upon the counts for fraud and misdemeanor?] There is abundance of authority in support of those counts. Procuring a marriage with a minor by false allegations is a misdemeanor (*R. v. Thompson*, 3 Chitt. Crim. L. 713); so producing a false certificate in evidence (*R. v. Maxobey*, 6 T. R. 619); and this case comes within the general principle that in matters of public concernment a cheat practised by means, against which no ordinary care could provide, is a misdemeanor at common law. In *Omealey v. Newell* (8 East, 364), Lord Ellenborough said that he had not the least doubt that any person making use of a false instrument in order to pervert the course of justice was guilty of an offence punishable by indictment. *R. v. Wheatley* (2 Burr. 1125; 1 Bl. Rep. 273), points out the distinction between frauds which are, and frauds which are not, indictable at common law. That was an indictment for fraudulently selling sixteen instead of eighteen gallons of liquor; and Lord Mansfield said, "It amounts only to an unfair dealing and an imposition on this particular man, by which he could not have suffered but from his own carelessness, in not measuring the liquor when he received it, whereas fraud, to be the object of criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy." So, in *Young v. The King* (3 T. R. 104), Buller, J., said, "To make an offence indictable at common law, it must be public in its nature; and the distinction which has been taken in the case of using false weights and measures shows it more clearly than any other. If a person sell by false weights, though only to one person, it is an indictable offence; but if, without false weights, he sell to many persons a less quantity than he pretends to do, it is not indictable." (He also cited *R. v. Osborn*, 3 Burr. 1697; *R. v. Smith*, Dougl. 442; and *R. v. De Beauvoir*, 7 Car. & P. 17, where the misdemeanor was in falsely swearing to a qualification to sit as a member of parliament.) Lastly, the licence to marry is stated in the very words of the statute, which is enough: (*Walter v. Rumball*, 4 Mod. 385; *Wilson v. Nightingale*, 8 Q. B. Rep. 1034.) The proof, of course, must be of a written licence, and it was.

Phinn, in reply.—To prevent the due course of law in a court of justice is certainly a misdemeanor; and so it is to sell by false weights; but unless a marriage is had, the mere procuring of a licence by fraud, and without the intention that a marriage should be solemnized, is not a fraud in which the public are concerned.

LORD DENMAN, C. J.—I feel that some apology is due from me

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for having reserved this case; and my apology is, that without argument at the trial, it seemed to be agreed between the learned counsel that there was an important question to be discussed. Certainly, if I had considered the point at the time, I should have felt it my duty to decide it immediately, and not to trouble this court with it at all; and now that I have considered it, it seems to me clear of all possibility of doubt. Here is a person who goes to a public officer, and obtains from that public officer by a false oath a licence to do an illegal act; that is, an act made illegal by the falsehood so practised. In a matter of the greatest public concern, as marriage certainly is, a fraud is committed by means of a false statement; a person goes and makes oath before a public officer, who, ever since the year 1603, has been in the constant practice of administering that oath, and whose power to do so is recognized by the stat. 4 Geo. 4, who is bound, therefore, to exercise that power *in consimili casu*, upon the application of all persons who state themselves to be in a certain condition; he is induced to grant the licence on a false representation that the applicant is in that condition; and then it is argued that he had no authority to administer that oath, because he was deceived by the false oath, and the applicant was not in fact such a person. Again, it is said that there was no offence, because a marriage was not actually had; but nothing is more clear than this, that any one step, necessary and useful for the purpose, wilfully taken towards the completion of a misdemeanor, is itself a misdemeanor. If, therefore, the false oath taken was not perjury, which I am very unwilling to admit, and desiring to keep that point open for consideration on any future occasion, I have no doubt whatever, that in this case a misdemeanor was committed.

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Baron Parke.

PARKE, B.—I entirely agree with my lord in this case. I think that the 3rd count is supported. As to the evidence, it is said to be defective in not showing that the defendant swore anything but what is stated in the memorandum as having been deposed upon oath, and that that memorandum included part only of the matters which the defendant is stated in the indictment to have falsely sworn; but the memorandum does contain the statement that the defendant deposed on oath that Sarah Fry had had her usual place of abode for the space of fifteen days within the parish—that is required by the statute. It is found here that the defendant's statement in that particular was untrue to his knowledge, and if any one of the statements made upon oath is false, it is enough to support the indictment; and I think that it is a misdemeanor at common law to impose upon a public officer by illegal means, and thereby induce him to do an act in the exercise of his office which he would not otherwise do. The count, therefore, is, in my opinion, supported, unless it be as to the allegation that the surrogate had power and authority to administer the oath; perhaps, according to the statute, he had not power to administer the oath to this individual; but he is the officer who, by law and in practice, has in ordinary cases authority to administer this

oath; and I think that, by the allegation in this 3rd count, it is not meant that the surrogate had power to administer such an oath, that perjury could be assigned upon it; and so reading the words, there is no doubt that the surrogate had the power according to the practice of the ecclesiastical courts. I think, therefore, that the allegation is supported in such a sense, that the defendant may be guilty of a misdemeanor, though, perhaps, not of perjury. The only remaining question is, whether the count is good on the face of it; and I think that the taking a false oath before a person, before whom it is necessary to be taken in order to obtain a particular licence, and obtaining the licence thereby, is a misdemeanor; and that this indictment is sufficient without alleging that the marriage was had, or that the object was to procure a marriage. It must be understood that this person has wilfully taken a step towards enabling himself to commit a violation of the law, and more is not necessary. Everything concerning the law of marriage is certainly of public concern.

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—

PATTESON, J.—I am of the same opinion. It is not necessary to determine whether the 5th count can be sustained, as the court are of opinion that the counts for the misdemeanor may be supported. But there are in those counts which charge a misdemeanor only, allegations that the surrogate had power to administer the oath; I think, however, that those allegations do not necessarily mean that the surrogate had power to administer such an oath, that if falsely taken perjury would lie. It is said that he had not power to administer it to this particular person; but he had the general power to administer this oath to all persons; the statute 4 Geo. 4 does not give him that power; but it recognizes him as having that power; and provides that no licence shall be granted unless the oath be taken before him. But then it is said, because the prisoner was not one of the parties for whom the licence was obtained, although he represented himself to be so, the surrogate had not authority to administer that oath to him; so that that which is a part of the fraud is supposed to prevent it from being an offence. The surrogate had authority, if the defendant was one of the parties, and he came before the surrogate and took the oath as one of the parties, and I think, therefore, the charge of misdemeanor was clearly proved. It is not necessary that the unlawful design should be entirely completed; it is sufficient to show an act done with the intention and towards the completion; and I think that is sufficiently shown; for the count charges that the false oath was made with intent to deceive the surrogate and obtain the licence; and that the licence was obtained. The 3rd count does not state that the false oath was made in an affidavit; but the question whether or not the other parts of the statement were sworn to or not has become immaterial, because there is a distinct assignment of perjury upon the statement as to the residence of the woman; and there is no doubt that that statement was false.

Judgment of
Mr. Justice
Patteson.

COLTMAN, J. and WILLIAMS, J., concurred.

Conviction affirmed.

CROWN CASE RESERVED.

June 2, 1849.

(Before LORD DENMAN, C. J., PARKE, B., PATTESON, J.,
COLTMAN, J., WILLIAMS, J.)

REG. v. BRISBY. (a)

Bastardy order—Jurisdiction of justices—Second application—Indictment for disobedience to order of justices.

If two justices have made an order upon the putative father of a bastard child under 7 & 8 Vict. c. 101, which is invalid upon the face of it, it is competent to the same two justices, or to two other justices, having jurisdiction in the case in other respects, to make upon the mother's application a second order upon the same person, as if there had been no previous application.

THIS was an indictment for disobeying an order of justices, dated the 6th of May, 1848, and was tried at the Epiphany Sussex Sessions at Petworth.

The defendant was found guilty, subject to the opinion of the court on the following case:—

Case.

On the 1st day of January, in the year of our Lord 1848, Sarah Hollist obtained an order of two justices against the defendant as the putative father of her bastard child. A true copy of that order is hereunto annexed, marked with the letter A.

This order was served upon the defendant, but no payment was made by him under it.

On the 28th of April, in the same year, the justices who had made the order of the 1st of January, made a *supersedeas* of the same under their hand and seals. This *supersedeas* was endorsed on the said order of the 1st of January, and was in the following words: "Whereas it doth now appear unto us, George Wyndham, and John Luttmann Ellis, Esqrs., the justices of the peace above named, that the order above set forth is, by reason of certain errors therein, and omissions therefrom, invalid according to law, and being advised by counsel that such order is so invalid, we do therefore hereby absolutely and irrevocably supersede, annul, and make void the said order.

"Given under our hands and seals this 28th day of April, 1848.

"GEORGE WYNDHAM (L.S.)
"J. L. ELLIS (L.S.)"

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

This *supersedeas* was served on the same day upon the defendant, and a tender was made him, but declined, of a sufficient sum to cover all the costs actually incurred by him in consequence of the said first order.

On the following day, the 29th day of April, Sarah Hollist made another complaint, and a fresh summons was thereupon sued against the defendant, requiring him to appear at a petty session of the peace holden on the 6th day of May, to answer each complaint of the same Sarah Hollist, respecting the same bastard child. The justice who granted the said summons was one of the justices who made the said first order, and executed the said *supersedeas*. The defendant protested against the justices at such last-mentioned petty sessions having jurisdiction to hear and adjudicate upon the said complaint of the said Sarah Hollist, against him, as there had already been a judicial hearing and adjudication by a competent tribunal on the same, and as the said order on the 1st of January, touching the same subject-matter, was still in existence. The justices, one of them being the same Mr. Ellis, who had made the former order and *supersedeas*, and who had sued the last summons, considering that they had jurisdiction, made another order against the defendant respecting the said complaint of the said Sarah Hollist, respecting the said bastard child, which said last-mentioned order the defendant was indicted for disobeying. A true copy of the said last-mentioned order is hereto annexed, marked with the letter B.

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This order was duly served upon the defendant who refused to obey under it. All the facts were admitted on the trial, but it was contended on behalf of the defendant that the second order was made without jurisdiction, as there had been a previous judicial hearing and adjudication on the same subject-matter, and a previous order made thereon, and which at the time of the making of the second order had not been quashed on appeal, but was still in existence. It was argued for the prosecution, that as the first order was an invalid one, which was admitted by the prisoner's counsel, and had been duly superseded, and as a sufficient tender of all costs occasioned by it had been made to the defendant before the summons for the second order was issued, the justices had jurisdiction to make the second order, notwithstanding there had been a former one on the same subject-matter.

Case.

If the court should be of this opinion, the verdict of Guilty is to stand; if not, the verdict is to be set aside, and one of Not Guilty entered.

It is unnecessary to set out the orders referred to in the case.

Creasy, for the prisoner.—Whilst the first order continues in existence no second order can be made, and the first order, though invalid, is still in existence. The *supersedeas* is a nullity: (*R. v. Finchcliffe*, 10 Q. B. 356; 16 L. J. 78, M. C.) A *supersedeas* applies only to warrants of committal and other *ex parte* proceedings. There can be no *supersedeas* of a judicial order. Orders of removal have been superseded, but they are *ex parte* warrants.

Creasy for the
prisoner.

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Creasy for the
prisoner.

(He referred to *R. v. Townstal*, 3 Q. B. 357; *R. v. Llankrydd*, Burr. S. C. 658.) [PARKE, B.—But independently of the *superseas*, the first order is bad on the face of it, and a nullity. LORD DENMAN, C. J.—This question arose incidentally in *Ex parte Thomas* (1 Bit. & Par. New Mag. Cas. 170), and it was not denied that a second order might be made if the first was bad.] The fault in the first order is, that the words “in the presence and hearing” were struck out, so that all the evidence did not appear to have been taken in the presence of the putative father: (*R. v. The Duke of Grafton*, 17 L. J. 125, M. C.) The order is therefore invalid, but it ought to have been got rid of by *certiorari* before a second application was made; otherwise the justices would have to decide in the first instance whether the former order was or was not invalid, which would give rise to great inconvenience. In truth, upon general principles, the first application to justices exhausts the jurisdiction. In Paley on Convictions, p. 127, it is said: “All the justices of each district are equal in authority; but as it would be contrary to the public interest, as well as indecent, that there should be a contest between different justices, it is agreed that the jurisdiction in any particular case attaches in the first set of magistrates duly authorized, who have possession and cognizance of the fact, to the exclusion of the separate jurisdiction of all others. So that the acts of any other, except in conjunction with the first, are not only void but such a breach of the law as subjects them to indictment;” and for that position *R. v. Sainsbury* (4 T. R. 456), is cited. Under the old law the Quarter Sessions and the Petty Sessions had concurrent jurisdiction, but when application had been made to one tribunal the other could not afterwards be resorted to, and it was held that if a man was discharged by one quarter sessions a subsequent sessions could not make an order upon him: (*R. v. Tenant*, 2 Ld. Raym. 1423; S. C. Stra. 716; *Pridgeon’s case*, 1 Bulst. 255; Sir W. Jones, 330; *R. v. Smith*, 2 Bulst. 342.) In *R. v. Jenkin* (Cas. temp. Ld. Hardwicke, 301; S. C. Stra. 1050; 2 Sess. Cas. 161), it was held that justices had no power to “acquit” the putative father, but the above cases were recognized, and even there it was considered necessary to apply to quash the order. None of these cases were referred to in *R. v. Bucks* (18 L. J. 113, M. C.) [PARKE, B.—Why should the form of quashing be gone through?] Whilst the order is in existence no other justices can act. A bad rate, or a bad appointment of overseers, must be got rid of by *certiorari* before they can be treated as nullities: (*R. v. Fordham*, 11 Ad. & Ell. 73; *Barons v. Luscombe*, 3 Ad. & Ell. 589.) [PARKE, B.—Do you contend that even if the first order was quashed on appeal, there would be no jurisdiction to make a second order?] The argument is, first, that the jurisdiction is gone altogether; or, secondly, if not, that there is no jurisdiction so long as the first order continues in existence.

J. J. Johnson, contra.—This case is decided by *R. v. Hinchcliffe*, for that case shows that the justices are not *functi officio*, as soon as

be exercised their judgment, if the instrument by which the first order is void. How can the woman be denied her remedy by the circumstance of the justices making a second order, unless she is in circumstances to bear the expense of making it by *certiorari*? It is as if no order had been made. No more than if the magistrates dismissed the application, and a second order would not prevent a new application: (*R. v. Jenkin*, 11 M. C. 161.) This point was admitted in *R. v. Bridgman* (11 M. C. 44, M. C.); *R. v. Bucks* (18 L. J. 113, M. C.); and in *Thomas* (1 Bit. & Par. New Mag. Cas. 170). The Court of the Bench constantly recommends the abandonment of inferior orders (*R. v. The Justices of the West Riding*, 2 Q. B. 705; *R. v. The Justices of the West Riding*, 3 Q. B. 352); and there is no difference between an inferior order and *supersedeas*, unless the latter is more effectual. So if a judge may be abandoned by the party in whose favour the order is made: (*Maunder v. Collett*, 3 C. B. 554; *Wickens v. Cox*, 11 M. C. 20; *Macdougall v. Nicholls*, 3 Ad. & Ell. 813.) The Court has laid down in *Pridgeon's case*, *R. v. Tenant*, and *R. v. Smith*, that a party should not be put twice in peril in the same matter is not the case, but does not apply; no penal consequences could result from a first void order; and *Barons v. Luscombe*, and *R. v. Ford*, quite distinguishable. The difference is between orders on the face of them and orders invalid on the face of them. The first is of a poor-rate stands upon wholly different grounds.

B.—If an order is valid on the face of it, it may be set aside until it is set aside.] In the first order there was a total want of jurisdiction.

in reply.—The case of *R. v. Jenkin* was decided upon the 18 Eliz. which was very different from the present statute, c. 101. The latter statute renders a judicial inquiry by the justices necessary in every case. [PARKE, B.—But in that case the party may go from one set of justices to another until there has been a decision on the merits.] That is now under the consideration of the Court of Queen's Bench in several cases: (*R. v. The Justices of Gloucester*, (a) and *R. v. The Justices of the West Riding*, 11 M. C. 168.) The cases as to judges' orders afford no analogy, because the judges have a general, not a special jurisdiction.

DENMAN, C. J.—The first order is clearly void on first appeal; and, if so, the second justices had power to make an order, and the disobedience of the second good order is an offence, and the defendant is properly convicted.

PARKE, B.—If the application to the first two justices had been made without going into the merits, the second set of justices would certainly have had jurisdiction, for the jurisdiction is not confined to the first set of justices to whom an application is made,

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prosecution.

Reply.

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C. J.Judgment of
Baron Parke.

case has been since decided; but it is not yet reported. The court held that a new application might be made, although the first had been dismissed for insufficient

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in the same way as the application to the sessions was formerly limited. The present statute gives a general jurisdiction to any two justices of the division, and if two refuse to entertain the application, it may be made to two others, who may receive it. Now, in the present case, the first order is equivalent to no order. If it cannot be enforced against the putative father, it ought not to bind the mother. This is wholly independent of the question which has been raised in the Court of Queen's Bench, for this first order must be treated as a nullity; and then the case is the same as if the magistrates had drawn up an order and refused to sign it, or had refused to draw up an order. The two justices to whom the second application was made clearly had jurisdiction to receive it, and to that effect is the judgment of Mr. Justice Erle in *R. v. Bucks*. Whether that learned judge was right in saying that "a former decision upon the merits in favour of the putative father was an answer to the application," it is not necessary now to decide. There certainly seems in that respect to be some conflict between that case and *R. v. Jenkin* (Cas. temp. Hardwicke, 301.) But this case is free from all doubt.

Judgment of
Mr. Justice
Patteson.

PATTESON, J.—The first order made in this case was bad upon the face of it. It was mere waste paper; and, therefore, I think that this case is to be treated as if there had been no previous hearing at all—not as if the justices had heard the case upon its merits and then refused to make the order. If they hear the case on the merits and then decide upon the evidence that the man is not the putative father, I am not at present prepared to say whether any second application can afterwards be made. That is a question which has been argued before us, and upon which at present I give no opinion. But this is a totally different question. It stands as if there had been no hearing at all; and if there had been no hearing, of course the second set of justices had jurisdiction, and this indictment for disobeying their order is good.

Judgment of
Mr. Justice
Coltman

COLTMAN, J.—In this case I am of opinion that the first order is a nullity. By striking out certain words it does not appear that the evidence was taken in the presence and hearing of the putative father. That statement is made essential by the act of Parliament; and on the principles of the common law also the order is invalid, and being invalid, it is, in my opinion, a nullity; and the case stands as if nothing had been done by those justices.

WILLIAMS, J., concurred.

Conviction affirmed.

CENTRAL CRIMINAL COURT.

MAY SESSION.

May 10, 1849.

(Before BARON ALDERSON.)

REG. v. CLARKE. (a)

Rape—Assault.

that on a charge of rape the jury may find the prisoner guilty of assault where, disbelieving that the prosecutrix offered resistance to connection itself, they have independent evidence before them that resisted his efforts to lay hands on her in the first instance. But that they cannot be asked to find such a verdict where they have no evidence of the transaction except her statement.

The prisoner was indicted for a rape.

Godkin (for the prosecution, in opening the case), put it to the jury that if they should be of opinion that the evidence was sufficiently conclusive of resistance on the part of the prosecutrix to the rape itself to induce them to find a verdict against the prisoner as to the full charge, still, if they thought that when he laid his hands on her in the first instance it was against her only, they might find him guilty of an assault. It might often happen that a woman would resist a man's violence at first, but afterwards her resolution would be overcome by passion and sentiment, so that no such resistance as is requisite to be proved in a charge of rape would be offered to the commission of the act.

ALDERSON, B.—Surely this is the crime of rape or it is not at all. If the jury think that she consented to the connection, if they are ignorant whether she consented or not, how can they tell whether she consented or not to what you allege to be the first assault?

Godkin.—Suppose a man comes behind a woman and knocks her down and then has connection with her by her own consent, there would be an assault in the first instance, though the more serious charge would of course not be sustainable.

ALDERSON, B.—That is a different case entirely. The circumstance there would negate anything like consent in the first instance if they were clearly proved. Here, if the jury negative

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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resistance to the rape itself, they have no means of judging whether or not she consented to the prisoner's laying hands on her in the first instance.

[*Note.*—Mr. Parnell has been kind enough to furnish me with the following case.—REPORTER.]

REG. v. MALPAS.

At the Essex Lent Assizes, 1849, before Parke, B., Thomas Wheeler Malpas was indicted for a rape upon Ann Fosgate. The prosecutrix had died, since the alleged commission of the offence, of a fever caught in the village where she was living. Her deposition was accordingly put in evidence, and other evidence was given by which it was conclusively proved that the prisoner had had carnal knowledge of the prosecutrix. It was shown that the prisoner and the prosecutrix had been walking together for some time before the offence was said to have been committed, and that they remained in company with each other for some time after the connection took place before the prosecutrix returned home. But it was also proved by an eye-witness, that upon the prisoner's beginning to take liberties with the prosecutrix, she had screamed out and offered resistance.

Parnell addressed the jury for the prisoner, and contended that the case was rather an aggravated case of seduction than a rape.

In summing up, PARKE, B. told the jury that if they thought the prosecutrix resisted in the first instance but afterwards yielded to the prisoner's embrace under the influence of her own passions, or his solicitation, they might find the prisoner guilty of an assault.

Rodwell for the prosecution.

Verdict—guilty of an assault; sentence—one year's imprisonment and hard labour.

COURT OF QUEEN'S BENCH.

June 14, 1849.

REG. v. JOHN BOWEN. (a)

tment for false pretences—Omission of scienter—Aider by verdict
—Stat. 7 Geo. 4, c. 64, ss. 20, 21.

omission of the word “knowingly,” in an indictment for false pre-
ences, is no objection in arrest of judgment; even if it would be on
nurrer. An indictment for false pretences charged that J. B., on,
, at, &c., unlawfully did falsely pretend to H. that he had caused a
it of right to be issued at the suit of M. W. (the mother of the said
) and others for the purpose of establishing the right of the said
W. and others to a certain estate; and then requested the said H.
advance the said J. B. some money towards carrying on the said
tion: by means of which said false pretences the said J. B. did then
d there unlawfully obtain from the said H. the sum of 11., &c., with
ent to cheat and defraud the said H. of the same. Whereas in truth
d in fact the said J. B. had not and never has caused a writ of
ht or any other writ whatsoever to be issued at the suit of the said
W. and others, or at the suit of the said M. W. alone; and there
is then no action commenced or to be carried on, in which the said
W. was in any way interested:
, a good count after verdict.

de, per Lord Denman, C. J., that it would be good upon demurrer;
d that R. v. Henderson (2 Moo. C. C. 192), is wrongly decided.

THIS was an indictment for false pretences; of which the fifth Indictment.
 count was as follows:—“And the jurors aforesaid, upon their
 aforesaid, do further present that the said John Bowen, on
 3rd day of October, in the third year of the reign of our said
 sovereign lord William the Fourth, at the parish aforesaid, in
 county aforesaid, unlawfully did falsely pretend to the said
 Humphrey Hutchings that he the said John Bowen had caused
 it of right to be issued at the suit of the said Margaret Wil-
 (the mother of the said Humphrey Hutchings) and others,
 he purpose of establishing the right of her the said Margaret Fifth count.
 iams and others to a certain estate, to wit, the Whaddon Hall
 te, and the said John Bowen then and there requested the
 Humphrey Hutchings to advance him the said John Bowen
 ey towards carrying on the said action so commenced by the
 writ of right, by means of which said last-mentioned false
 nces the said John Bowen did then and there unlawfully

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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obtain from the said Humphrey Hutchings the further sum of 1l of the moneys of him the said Humphrey Hutchings, with intent then and there to cheat and defraud him the said Humphrey Hutchings of the same. Whereas in truth and in fact the said John Bowen had not, and never has, caused a writ of right or any other writ whatsoever to be issued at the suit of the said Margaret Williams and others, or at the suit of the said Margaret Williams alone, or at the suit of the said Margaret Williams jointly with any other person or persons whatsoever. And whereas in truth and in fact there was then no action commenced or to be carried on in which the said Margaret Williams was in any way interested, to the great damage and deception of the said Humphrey Hutchings, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said lord the late King, his crown and dignity.

The trial took place before Wightman, J., at the summer assizes for the county of Cardigan, in the year 1848, when a verdict of guilty was found upon the fifth count.

In the following Michaelmas Term *Watson* obtained a rule to show cause why that verdict should not be set aside and a new trial granted, or why the judgment should not be arrested.

Townsend and
Benson for the
prisoner.

Townsend and Benson now showed cause.—1. As to the motion in arrest of judgment, the rule was obtained on the ground that the word “knowingly” is omitted, and that therefore the count is bad in law; but it is at all events good after verdict. It follows the words of the stat. 7 & 8 Geo. 4, c. 29, s. 53, which enacts, “that if any person shall, by any false pretence, obtain from any other person any chattel, &c., with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor.” The 1st stat. 33 Hen. 8, c. 1, used the words—“If any person or persons *falsely and deceitfully* obtain any money, &c.,” and 30 Geo. 2, c. 24, these words—“All persons who *knowingly and designedly*, by false pretence or pretences, shall obtain, &c.” Then the last statute leaves out those words “*knowingly and designedly*,” and it must be taken that they were intentionally omitted. There is certainly good reason for the omission; for if a person falsely and fraudulently states that which is not within his knowledge, he does as much wrong as if he makes a statement which he knows to be false. Then the 7 Geo. 4, c. 64, s. 21, provides, that “where the offence charged has been created by any statute or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall after verdict be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.” Therefore as this indictment describes the offence in the words of the statute, the omission of the word “knowingly” cannot be taken as an objection in arrest of judgment: (*Reg. v. Law*, 2 Moo. & Rob. 197; 2 Russ. on Crimes, Ed. Greaves, 115.) In truth the *scienter* is involved in the verdict of guilty; for the indictment charges that the defendant did falsely pretend with intent to defraud; and

after verdict that allegation *ex vi termini* imports knowledge. If he had been misinformed or mistaken, he might have shown it by way of defence. The case of *Reg. v. Henderson* (2 Moo. C. C. 192; 1 Car. & M. 328) was decided upon demurrer.

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LORD DENMAN, C. J.—We think that there is great force in your argument. We will hear the other side.

P. Thompson, contra.—1. This count of the indictment is bad, or stating a false pretence, which is not within the statute. The money is obtained towards carrying on an action; the false pretence which induces the prosecutor to part with his money is a false pretence that the prisoner would carry on an action; and to be within the statute the false pretence must be of some existing fact, not of something to be done in future; not a mere promise for future conduct: (*Rex v. Goodhall*, Russ. & R. 461.)

Thompson for
the Crown.

LORD DENMAN, C. J.—The request to advance money towards carrying on the action is only a part of the narrative.

WIGHTMAN, J.—The false pretence alleged is, that the defendant had caused a writ to be issued.

Thompson.—Then, secondly, the *scienter* is of the essence of the offence. The defendant may have instructed an attorney to issue the writ, and in the belief that those instructions had been obeyed might have made the statement.

WIGHTMAN, J.—But the 7 Geo. 4, c. 64, s. 21, says that if the offence is stated in the words of the statute, it shall be held sufficient after verdict.

Thompson.—That statute only applies to cases where all the material averments to constitute an offence are found in the indictment. In *R. v. Martin* (8 Ad. & Ell. 481), an indictment for obtaining goods by false pretences was held bad on error for not stating to whom the goods belonged; and there Lord Denman, C. J., said, "Then is the defect cured by verdict? The act 7 Geo. 4, c. 64, s. 21, says, that after verdict the indictment shall be sufficient if it describe the offence in the words of the statute; and here the indictment does certainly pursue the words of the statute. But it is not enough to state the offence in general terms; the enactment assumes that the words shall be so employed as to show that some offence has been committed. . . . There are many instances in which, if merely the statutory form were followed, no offence could be charged. . . . We must put a reasonable construction on the act, and not go the length of holding an indictment good, after verdict, which charges only what may be no offence at all." Then *Reg. v. Henderson* is precisely in point. The marginal note is, "An indictment for obtaining money under false pretences must allege that the defendant knew the falsehood. 'Falsely and fraudulently' is not enough." The false pretence there charged was that one of the two prisoners was possessed of a certain sum of money; and the objection was taken that there was no allegation that the defendants knew that he had not the money, nor was it alleged that they did knowingly falsely pretend. Chitty's Crim. Law and *R. v. Wickham* (10 Ad. & Ell. 34), were cited; and it

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was said that his pocket might have been picked of the money without his knowledge; upon which the argument was stopped, and all the judges held the indictment bad for want of this allegation. It was considered to be an essential part of the statement of the offence. In *Reg. v. Wickham*, it was conceded by Sir F. Pollock, as counsel for the crown, that the defendant's knowledge ought to have been alleged, and that the words "falsely and fraudulently" were not sufficient; and in *Hamilton v. The Queen* (9 Q. B. Rep. 271; 2 Cox C. C. 11), Patteson, J., in giving judgment, assumes that the pretence must be false to the knowledge of the defendant. Lastly, the indictment is bad for repugnancy. It avers a request to advance money towards carrying on "the said action so commenced," and yet negatives the existence of such an action. It should have said, "the said pretended action."

LORD DENMAN, C. J.—That averment applies only to the misrepresentation, not to the fact.

Thompson.—In *Carter's case* (2 East P. C. c. 19, s. 56, p. 985), an indictment for forging a bill of exchange was held bad because it averred that the bill was signed by H. H., instead of averring that it purported to have been signed by him, the signature being a forgery. So it is bad to charge the defendant with forgery of a certain writing, whereby A. was bound to B.; for if forged it could not bind: (Hawk. P. C. lib. 2, c. 25, s. 62, citing 3 Mod. 104.)

LORD DENMAN, C. J.—Mr. *Townsend*, what answer do you give to *Reg. v. Henderson*?

*Thompson for
the Crown.*

Townsend and Benson.—That case was not much considered, and the objection was taken by demurrer. Assuming that it would be fatal upon demurrer, it is cured by verdict. The doctrine of aider by verdict is carried to a great length in the recent case of *R. v. Waters* (1 Den. C. C. 356; 3 Cox C. C. 300.) There the indictment was clearly bad on demurrer, for it charged a mother with exposing her child, but contained no averment that the child was unable to take care of herself. The court, however, held that after verdict that defect was cured; and Baron Parke, in delivering the judgment of the court, said, "In this case the jury could not have found the prisoner guilty without actually negating the power of the child to take care of herself, and so to escape the consequences of the unlawful act of the prisoner; and consequently after verdict that fact must be implied."

WIGHTMAN, J.—There the age was left doubtful by the indictment; and, after verdict, it was held that it must be intended that the child was of tender years; but what is left to intendment here?

Townsend.—The knowledge of the defendant must be intended from the fraudulent intent which is found.

WIGHTMAN, J.—He might have given instructions for issuing the writ, which had not been complied with.

Townsend.—In *Rex v. Airey* (2 East, 30), objection was taken by writ of error to an indictment that it nowhere alleged that the

fendant "did *falsely* pretend;" but it was held that after verdict "alselfy" must be intended. In *Hamilton v. The Queen*, Paton, J. seemed to think that the stat. 7 Geo. 4, c. 64, s. 21, moved all the objections taken in that case.

LORD DENMAN, C. J.—It is difficult, after the case of *Reg. v. Henderson*, before the fifteen judges, to say that "knowingly" not a necessary part of the statement of the offence.

Townsend.—It is submitted that that case was decided without much consideration, and without reference to the previous statutes; which lead to the inference that the word "knowingly" was purely omitted from the last statute. The case of *R. v. Philpotts* (Car. & Kir. 112), was decided at Nisi Prius upon the authority of *Reg. v. Henderson*, and before verdict.

WIGHTMAN, J.—I cannot help feeling that this indictment might be proved, though the defendant did not know that the pretence was false.

Townsend.—According to *R. v. Waters*, after verdict, the court must intend that which is necessary to justify the verdict.

LORD DENMAN, C. J.—And I think cases may be put, where the offence would be committed without knowledge that the pretence was false. If A. tells B. to go and obtain 20*l.* from C. by stating that A. had done a certain act, and B. upon a promise from A. that he shall have 20*s.* out of the 20*l.* goes, and with intent to defraud C. of his money, makes a false statement and obtains the money, is he not guilty of obtaining money by false pretences, though he did not know the statement to be false?

Townsend.—The mischief is the same, whether the false statement is made by one who knows it to be false, or one who does not know whether it is false or true: (*Haycraft v. Creasy*, per Lord Kenyon, C. J. 2 East, 103.) The other objections made to the indictment have been answered by the court. As to the trial, it can only be granted on payment of costs.

Thompson.—The *scienter* is a necessary ingredient of the offence; the omission to state it, therefore, is not cured by the verdict. It is a uniform practice, since the last statute as well as before, has been to insert the word "knowingly." *Rex v. Airey* is quite distinguishable. The words "by which false pretences" were in the indictment, and the objection was, that there was no averment that the defendant falsely pretended.

LORD DENMAN, C. J.—This question has now been fully discussed; and it appears to me that the 5th count, upon which the defendant was convicted, is good after verdict. After verdict is found to contain all the averments which appear in the statute; to know that it is said in some cases that to follow the words of the statute alone is not enough; but if the statute uses such words as are sufficient to describe the offence, then surely it must be enough to follow those words in the indictment; and during the argument I put a case in which a man might unknowingly, that without knowing the statement to be false, commit an offence within this statute, if he intended to cheat another of his money.

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I have certainly felt great difficulty in saying this after the decision in *Reg. v. Henderson*, but there does seem to me to have been something like an oversight upon that occasion. It does not appear that any reference was made to the circumstance that the term "knowingly" is omitted from the present statute, though it was contained in the former one. But further, that case was decided upon demurrer, and not after verdict. I confess, however, that it seems to me, upon an examination of the statutes, that we must give effect to the language of the clause, upon which this indictment is framed; and I therefore think it good. As to the new trial, my brother Wightman is not satisfied with the manner in which the case was disposed of, and there will therefore be a new trial on payment of costs.

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WIGHTMAN, J.—I am of the same opinion as to the motion in arrest of judgment. I understand the case of *Reg. v. Henderson* to have decided that on demurrer the word "knowingly" ought to appear; but this is a motion in arrest of judgment, and there are many defects, which would be fatal on demurrer, which nevertheless cannot be taken advantage of after verdict; and I take it that if an offence at all is charged by the indictment, that is sufficient after verdict. Now here the precise terms of the act are pursued: "if any person shall by any false pretence obtain,"—not using, as the former statute did, the term "knowingly." Now the act for curing defects after verdict, 7 Geo. 4, c. 64, s. 21, expressly says that the indictment shall after verdict be held sufficient "if it describe the offence in the words of the statute." Therefore the question is whether the 5th count shows any crime; and I think that it does *primâ facie* show an offence within the terms of the act of Parliament, although if *Reg. v. Henderson* be good law, it may show it defectively. Then *Reg. v. Waters* points out the distinction between an indictment showing no crime, and one stating a crime defectively; and I think this falls within the latter class of cases. If that be so, but it was still necessary to prove that the false pretence was knowingly made in order to justify the verdict, then, according to *Reg. v. Waters*, after verdict that fact must be implied. For these reasons I am of opinion that this count is good after verdict, though if *Reg. v. Henderson* be rightly decided, upon which I give no opinion, it would have been bad upon demurrer.

Rule in arrest of judgment discharged.

COURT OF QUEEN'S BENCH.

May 24, 1849.

REG. v. MARY ANN NEWTON. (a)

Practice—Jury.

The propriety of discharging the jury in a criminal case, upon the ground of their being unable to agree, is a matter within the discretion of the judge.

The trial of an indictment for murder was concluded in the middle of Thursday. The jury retired to consider their verdict, and, being unable to agree, were locked up during the night. On Friday morning they came into court, and stated that they were equally divided, and that it was impossible that they should agree. All the other business of the assizes was over; and the duty of the judge required him to go to the next town on the circuit.

Held, that under these circumstances, he was justified in discharging the jury.

Semble, if the discharge of the jury was wrong, it would not have entitled the prisoner to be discharged upon habeas corpus.

HUDDLESTON had obtained a rule to show cause why a writ of *habeas corpus* should not issue to bring up the body of Mary Ann Newton, now a prisoner in custody in the gaol at Shrewsbury, under a justice's warrant of commitment, upon a charge of murder. The affidavits stated that the prisoner was placed upon her trial for murder at the last Shrewsbury Assizes; that the trial began on Wednesday, the 21st of March, and was adjourned to the following day, when the learned judge summed up the evidence, and the jury, about two o'clock, retired to consider their verdict. They were unable to agree, and were locked up all night. On the Friday morning, at eight o'clock, they came into court, and stated to the judge that they were equally divided, and that it was quite impossible that they should agree; and he then discharged them. It was admitted that this was the last case to be disposed of at the assizes; and that that Friday was the commission day at Hereford, the next town on the circuit, where the presence of the judge was required.

Sir John Jervis (*Attorney-General*), with whom was Welsby, The Attorney-General for the Crown. showed cause.—The practice in criminal as in civil cases, in this respect, must depend upon the real justice of each particular case. If the judge finds that there is no reasonable expectation of the jury coming to an agreement, he may discharge them. Some of the older authorities cannot now be sustained; for in some of them

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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it is certainly said that in a criminal case affecting life or member the jury cannot be discharged until they have given a verdict (*Co. Litt.* 227, *b.*; *Chadwick v. Hughes*, *Carth.* 465); but there are also cases the other way (*Ferrar's case*, *T. Raym.* 84; *Doctor & Stud.* p. 52); and that notion is now exploded, and has been so considered in many more recent authorities (*Whitbread's case*, 7 *St. Tr.* 311; 2 *Hale's P. C. c.* 41, pp. 293-4); and in *Kinlock's case* (*Fost. Cr. L.* 16), the matter was very much considered; and the discretion of the judge in each case distinctly recognized (*a*).

(*a*) The learned counsel read the whole of Mr. Justice Foster's judgment, from which the following passages are extracted:—"This case hath been very well argued at the bar; but the counsel on both sides went into the general question, touching the power of the court to discharge juries sworn and charged in capital cases, further than I think was necessary. The general question is a point of great difficulty, and of mighty importance; and I take it to be one of those questions which are not capable of being determined by any general rule that hath hitherto been laid down, or possibly ever may be. For I think it is impossible to fix upon any single rule which can be made to govern the infinite variety of cases which may come under this general question, without manifest absurdity; and, in some instances, without the highest injustice. I therefore choose to consider the present question singly, as it standeth upon the record, and to throw out of it every consideration that is foreign to it; and possibly, by so doing, most of the objections which have been made in the present case may receive this short answer—That they are levelled at an improper exercise of the power, but do not touch the present case. The question, therefore, is not whether a jury may be discharged after evidence given, in order to the preferring a new indictment better suited to the nature of the case; where, through the ignorance or collusion of the officer, or the mistake of the prosecutor, the fact laid varieth from the real fact, or cometh short of it in point of guilt. This was frequently done before the revolution, and in one or two instances since: (*Kel.* 26, 51; *Comb.* 401.) But this is not the present question. Nor is the present question whether the court may discharge a jury sworn and charged, where undue practices appear to have been used to keep material witnesses out of the way; or where such witnesses have been prevented by sudden and unforeseen accidents: (*1 Vent.* 69.) This likewise is not the question, and I give no opinion on it; only let it be remembered that Lord Chief Justice Hale (*2 Hale*, 286, 296, 297,) justifieth this practice, which he saith prevailed in his time, and had long prevailed, by strong arguments drawn from the ends of government, and the demands of public justice. Nor is it now a question, nor, I hope, will it ever be a question again, whether, in a capital case the court may, in their discretion, discharge a jury after evidence given and concluded on the part of the crown, merely for want of sufficient evidence to convict; and in order to bring the prisoner to a second trial, when the crown may be better prepared. This was done in the case of *Whitbread and Fenwick* (*2 St. Tr.* 827, 828), and it was certainly a most unjustifiable proceeding. I hope it will never be drawn into example. It seems that an opinion did once prevail, that a jury once sworn and charged in any criminal case whatsoever, could not be discharged without giving a verdict; but this opinion is exploded in *Ferrar's case* (*Rayn.* 84), and it is there called a *common tradition*, which had been held by many learned in the law. My Lord Coke was one of those learned men who gave in to this tradition, as far, at least, as concerneth capital cases; and he layeth down the rule in very general terms, in the passages which have been cited on behalf of the prisoners from his *1st* and *3rd Institutes*: (*1 Inst.* 227, *b.*; *3 Inst.* 110.) The same rule is laid down in *Hale's Summary of the Pleas of the Crown* (p. 267); a very faulty incorrect piece, never revised by him, nor intended for the press. But, as his lordship, in his *History of the Pleas of the Crown*, justifieth the contrary practice, his authority is clearly on the other side of the question: and his authority is the more to be regarded, because he had seen and well considered the passages cited from Lord Coke; though I believe the rule as it standeth, in his summary, hath contributed not a little to the confirming many people in Coke's opinion. Another case, which I take to be an exception to the general rule contended for on behalf of the prisoners, is, when by the indulgence of the court, and the consent of the Attorney-General, the trial of the issue goeth off after the jury sworn and charged; in order to entitle the prisoner to some advantage in point of defence, which in the rigour of the law he could not otherwise be entitled to. And this, I apprehend, appeareth from the case of *Rookewood* (*4 St. Tr.* 649), which also was cited at the bar. In that case the jury was sworn and charged, and the indictment opened by the king's counsel. The prisoner's counsel then offered some exceptions to the indictment, apprehending, as they said, that since the act of 7 King Will. declareth that the exceptions therein mentioned shall not be taken after evidence given, the prisoner, by a favourable construction of the act, had liberty to take exceptions anytime before evidence. The court was unanimously of opinion, that the prisoner's counsel had lapsed their time for taking any exceptions at all: that the proper time for taking exceptions is before issue joined, or at least before the jury sworn. And yet it being a case of life, and on a new Act of Parliament, the court did agree that, in that instance only, the counsel should be at liberty, with the consent of the Attorney-General, to take their exceptions; confining themselves to the exceptions mentioned in the

Several cases, in which juries have been discharged, are collected in Chitty's Burn's Justice, tit. Jurors. *R. v. Gould*, where a juryman was taken ill, and died. [COLERIDGE, J.—I recollect a case of murder tried on the Western Circuit, by Best, C. J.; a juryman was taken ill, after one or two witnesses had been examined, and it being found that he could not return, a new juryman was sworn, and the evidence retaken. Afterwards objection was made to that course; but the objection was not sustained.] In a case of murder at Coventry, about two years since, Coltman, J., discharged a jury under circumstances similar to the present, and the prisoner was again tried at the following assizes, and then acquitted. So, in *Cobbett's case* (3 Burn's Just. 974, Chitty's Ed. 1845), Lord Tenterden discharged the jury. [LORD DENMAN, C. J.—When I was common serjeant, I tried a case, in which the jury could not agree; I remained all night to receive the verdict, and on the following day consulted Lord Tenterden, who gave his opinion that it was competent to me to discharge the jury, and I accordingly discharged them.] If the jury are taken to the border of the county, then, as soon as the judge gets into the next county, the jury would be discharged as a matter of course. [LORD DENMAN, C. J.—How is the warrant of commitment got rid of? COLERIDGE, J.—When the motion was made I suggested this difficulty, that the earlier part of the Habeas Corpus Act (31 Car. 2, c. 2,) could not apply to this case; and that if any clause applied, it was the 7th; but then the 7th does not apply until after two assizes have passed from the date of commitment. The answer was, that having been put upon her trial, and the jury having been improperly dismissed, she was discharged by due course of law.] The gaoler would return the commitment; and though it appeared that there had been an intermediate gaol delivery, that would not entitle the prisoner to be discharged; because the Habeas Corpus Act does not give that right till after a second assize has passed. But, further, it is said, an abortive trial has taken place; there is, however, no record of any trial; no judgment either of conviction or acquittal. It must be admitted

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act, of which they could not have the benefit in arrest of judgment. The prisoner's counsel declined to enter into their exceptions under that restriction, and so the trial went on, but had exceptions under the restrictions of that act been taken and allowed, the indictment must have been quashed; and the jury then sworn and charged must have been discharged without giving a verdict. Lord Chief Justice Holt did not come readily into the expedient proposed by the rest of the judges, of letting the prisoner's counsel into their exceptions, even with the consent of the Attorney-General, and in the conclusion declareth that the attorney could not consent to it, unless he would also consent to discharge the jury. Upon the whole, my opinion is that all general rules touching the administration of justice must be so understood as to be made consistent with the fundamental principles of justice; and, consequently, all cases where a strict adherence to the rule would clash with those fundamental principles are to be considered as so many exceptions to it. The cases I have mentioned, and many others which might be mentioned, are exceptions to the general rule insisted on on behalf of the prisoners. The case at bar is, I think, an exception to that rule; and, at the same time, standeth clear of the inconveniences mentioned by the prisoner's counsel. The discharging the jury in this case was not a strain on the prerogative: it was not done to the prejudice of the prisoners; on the contrary, it was intended as a favour to them. In that light I say it was considered by the court; in that light it was considered by the prisoners and their counsel, and accordingly they prayed it; and in that light Mr. Attorney-General, with his usual candour, consented to it. And in that light I know of no objection in point of law or reason to it. And, therefore, I am of opinion that judgment ought not to be arrested."

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that if one of the jury dies during the trial, another jury may be sworn to try the prisoner; but the judge cannot be driven to make a jurymen sit in the box until he dies; he must, therefore, judge when the proper time has arrived for discharging the jury; and his decision cannot be reviewed. It is difficult to see how it could ever be made the ground of a motion in arrest of judgment, as in *Kinloch's case*; for, upon that motion, the parties would be confined to matter appearing on the record; and the fact of the discharge of the jury would never appear. [COLERIDGE, J.—I think that is an argument against yourself; because the greater the difficulty of raising the question, whether the judge has properly exercised his discretion, supposing it to exist, the less probable is it that in a matter so important, the discretion should exist at all.] The necessity of exercising a discretion is forced upon him. Old practices cannot be much relied on; for formerly in criminal courts there was only one indictment against all the prisoners. [LORD DENMAN, C. J.—Yes; and the jury, at the end of the day, retired and considered all the cases which they had heard during the day; and then gave all the verdicts in the different cases together.] In the present case the learned judge had but two courses to pursue: either to discharge the jury, or to take them to the border of the county, where they would be discharged by the effect of the judge leaving the jurisdiction. In *Conway and Lynch v. The Queen* (7 Ir. Law Rep. 149,) the question was raised by a plea, which stated circumstances different from those existing in the present case. The following is the marginal note of that case:—"A jury charged with the trial of persons indicted with a capital offence having remained enclosed for a considerable time to consider their verdict, returned into court, and intimated to the judge that there was no likelihood of their agreeing, who thereupon discharged them without consent, and without objection on the part of the prisoners, or of the crown, and without any fatality having occurred, and remanded the prisoners. The prisoners being again indicted at the following assizes for the same offence, put in pleas in the nature of pleas *puis darrein continuance*. The crown replied, and the prisoners demurred to the replication. Held, that the demurrer should have been allowed, and that the judge had no discretion to discharge the jury, unless a case of evident necessity had existed. Held, also, that if such necessity existed, an entry of the facts establishing such necessity should have been on the record" (Crampton, J., *dissentiente*.)

COLERIDGE, J.—In *Rex v. Edwards* (4 Taunt. 309; Russ & Ry. 224), which was a capital case, the jury were discharged on account of the illness of a jurymen; and Blackstone (4 Comm. 360), excepts "cases of evident necessity."

Sir John Jervis.—All the cases are collected in Chitty's *Burn's Justice*, tit. Jurors.

Huddleston, *contra*.—It is admitted that there are exceptions to the general rule, which is laid down with the utmost distinctness in many cases, and in nearly all the text books of authority. In

1 Inst. 227 b., it is said, "a jury sworn and charged in a case of life or member cannot be discharged by the court or any other, but they ought to give a verdict;" and in 3 Inst. 110, "to speak it here, once for all, if a person be indicted for treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is returned and sworn, their verdict must be received, and they cannot be discharged." To the same effect is 2 Hawk. P. C. c. 47, s. 1; Hale's Summary of the Pleas of the Crown, Verdict, 267; Viner's Ab. Trial, X. E. 4; Bac. Abr. Juries, G. 576; Trials per Pais, c. 12, p. 252; *Chadwick v. Hughes* (Carth. 465.) In *Kinloch's case*, Mr. Justice Foster calls in question the authority of *Chadwick v. Hughes*, and treats it as an extra-judicial opinion. The attention of that learned judge was not drawn to the case of *R. v. Segar* (Comb. 401), in which the same question was raised two years before. Further, *Chadwick v. Hughes* was decided in 1698, long after *Ferrar's case* (T. Raym. 84), which was decided in 1634, but to which Mr. Justice Foster refers as having destroyed the common tradition amongst lawyers upon this subject. [COLERIDGE, J.—In *R. v. Segar*, the jury were discharged without giving a verdict; upon that there seems to have been no difference of opinion amongst the judges, but a query is added by the reporter. LORD DENMAN, C. J.—And Comberbach is not a reporter of great authority.] Further, in *Kinloch's case*, the general rule was not disputed, but the judgment proceeded upon the ground that that case was an exception; and Sir Martin Wright, dissenting from that judgment, said "he thought it safer to adhere to the rule of law, which is clearly laid down by Lord Coke, than upon any account to establish a power in judges, which it is admitted hath been grossly abused, and may be so again." In the Eighth Report of the Criminal Law Commissioners, p. 155, s. 9, art. 7, the same general rule is stated; and the notion of the judge having a general discretion to exercise as to the time at which he may properly discharge the jury, is also contradicted by the old practice of taking the jury to the border of the county. (1 Chitt. Cr. Law, 634; Burn's Justice, tit. "Juror," citing 2 Hale, 297; Trials per Pais, 274, 285; and *Morris v. Davis*, 3 Car. & P. 427.) In *Lord Delamere's case* (11 St. Tr. 510), the jury were not allowed to separate; and Herbert, C. J., fully recognized the doctrine laid down by Lord Coke. But there are certain well recognized exceptions to that rule, and those exceptions exist only in cases of evident necessity: (4 Blac. Com. 360.) If, for instance, the prisoner or a juryman dies or is taken ill, or if the prisoner requests it, in order to enable him to make another defence, the judge may discharge the jury; but excepting in such cases he has no discretion. *Rookwood's case* (4 St. Tr. 649), at the most, only shows an opinion of the judges that at the prisoner's request, and for his advantage, and with the consent of the crown, the jury might be discharged without giving a verdict: *R. v. Gould* (Toml. Law Dict. Jury, 3), where the discharge of the jury was rendered necessary by the death of a juryman: *R. v. Edwards* (4 Taunt.

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309; Russ. & Ry. 224; and 3 Camp. 207, n.); and *R. v. Scalbert* (2 Leach C. L. 620, 706), where a juryman was rendered incapable by illness: *R. v. Elizabeth Meadows* (Fost. C. L. 76); and *R. v. Stevenson* (2 Leach C. L. 546), in which cases the prisoner was taken ill: (*R. v. Streek*, 2 Car. & P. 413.) [PATTESON, J.—The death of a juryman, or of the prisoner, is a case of necessity; but not the illness of either.] None of these cases go the length of deciding that the judge has any discretion as to what is a reasonable length of time for keeping the jury together, or that the termination of the assizes at the town where the trial takes place is such a case of evident necessity as to justify the discharge of a jury. A case occurred at Stafford some years ago, which occupied ten days, and Erskine, J., who tried it, was prevented from appearing either at Shrewsbury or Hereford. The passage cited from *Ferrar's case* (Sir T. Raym. 84), is a mere *dictum*, and it is doubtful whether that was a capital case. Indeed, Hawkins (lib. 2, c. 47, s. 1,) quotes it as a case of an inferior offence. The cases of juries being discharged, in Kelinge's Reports (pp. 26, 52), were decided before the Revolution, and by the same judges who decided *Whitbread's case*. In *Whitbread's case* (2 St. Tr. 827), it was held that the jury might be discharged in order to enable the crown to get more evidence, which is condemned in *Kinloch's case*, and certainly would not be sustained now. In *R. v. Stokes* (6 Car. & P. 151), the jury were discharged at the request of the prisoner's counsel. In *R. v. Wardell* (Car. & M. 647), although one of the jury was a near relation of the prisoner, Erskine, J., and Tindal, C. J., thought that there was no power to discharge the jury. In *R. v. Wade* (Moo. C. C. 86), the jury were discharged in order that a witness might be taught the nature of an oath, and that was held wrong. *Conway and Lynch v. The Queen* (7 Ir. Law Rep. 149), is a very strong authority in support of the present rule. In that case the plea and replication stated the facts, and the objection was raised by demurrer; and, after much discussion, three of the learned judges decided that the plea was a good answer; that mere lapse of time, without a prospect of agreement, was no sufficient ground for discharging the jury. [COLERIDGE, J.—If nothing but necessity will justify the discharge, what is to be done when the commission is at an end?] There must be some period at which the judge will be compelled to leave the town; and then, perhaps, the case of necessity would arise. There must be something of a very strong and urgent nature to justify the deviation from the general rule. [PATTESON, J.—What authority is there for asking us to discharge the prisoner on *habeas corpus*?] It was done in *R. v. Gould*, and there is no other remedy. [PATTESON, J.—The statute of Charles excepts criminal cases, and the writ at common law only issues upon reasonable ground shown.] It is a writ of right; and upon return to the writ it would appear that the prisoner was entitled to her discharge. The warrant of commitment would not, under the circumstances, justify her detention.

LORD DENMAN, C. J.—Very early in this argument I put the question which has been last adverted to. This person was sent to prison under a justice's warrant, on suspicion of having committed a crime, to be discharged by due course of law, and I wished to hear in what manner the effect of that warrant was got rid of. The answer given is this, that the prisoner has been put upon her trial for the crime, and that the jury were improperly discharged,—that they were improperly set at liberty, when it was their duty to remain together, and the duty of the judge to keep them together; and that, therefore, the prisoner is now entitled to be discharged. Now, in the first place, I do not see that that at all follows as a legal or logical inference; it seems to me quite possible that a jury may be improperly discharged, and yet the party charged properly remain in custody for trial. The discharge of the jury is neither an acquittal or a conviction—there is no judgment—nothing that would appear upon the record, unless the facts were specially stated in a plea, as in the case of *Conway and Lynch v. The Queen*. In the first place, then, protesting that I do not see that an improper discharge of the jury necessarily entitles the prisoner to be discharged, that they are at all convertible terms, the question has not been answered whether the warrant of commitment still continues in force;—I think it does, and that therefore this person has no right to be discharged. The Court of Queen's Bench in Ireland is a great authority, and the case in that court was decided upon much consideration and after full resort to all the cases, which are discussed with much learning; and if we had any discretion to exercise, I think that we ought not to act upon it by discharging the prisoner upon this summary application. If the circumstances afford any answer, and the person is brought into jeopardy again, they ought to be put upon the record. I think it ought to be pleaded by the prisoner that such circumstances had taken place as entitled her to be discharged, so that the whole matter might be solemnly argued. The question is certainly one of great importance. Mr. *Huddleston* has properly pointed out that the discretion of the judge may be mistaken, or exercised from improper motives; but I do not see anything in this case which brings it within the authority of the case in the Queen's Bench in Ireland. The statement of the facts there would fall quite short of the necessity which would justify the discharge of the jury; but here there is a statement of circumstances which in many cases in England have been held to amount to that necessity—the long delay; the impossibility of the jury agreeing; and, further, the necessity of the judge performing duties in another place. It has been said by some judges that no rule can be laid down in these matters; but the fact is, that there must be rules and exceptions to the rules, which are a part of them; the only difficulty is in the application of them to the circumstances which may arise, and which cannot be foreseen. I admit that a necessity must be shown in order to justify the discharge of the jury; but, then, in every case it remains to consider whether that necessity

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exists; and it is clear that the judge must exercise a discretion as to that fact. In this case it appears that the learned judge has exercised his discretion under circumstances which, in many instances, have been held in this country a complete justification; and, therefore, without entering more particularly into the argument, it seems to me that the judge has done quite right; but if not, I am of opinion that a wrong discharge of the jury does not give the prisoner a right to be discharged; and in the conclusion to which I come, I act upon the persuasion that the warrant of commitment still remains in force.

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Patteson, J.

PATTESON, J.—This is an application for a writ of *habeas corpus* at common law; and therefore it is not grantable as a matter of course, but only upon reasonable grounds being shown. Reasonable grounds may, however, be supposed to have been shown in this case, because this is not the first application for the writ; a rule has already been granted to show cause why the writ should not issue; and it is that which is now before us; so that upon the crown coming in and showing cause, it is much the same thing as if the writ had issued and a return had been made. The proper steps therefore have been taken here to call upon us to say whether the writ ought to be issued. Now I agree with my lord that the custody must be shown to be illegal in order to induce us to grant the writ; and it is attempted to be shown that the custody of this prisoner is illegal—that the original commitment is spent, so to speak, and has come to an end, and that the prisoner can no longer be detained, by reason of the fact that she has been put upon her trial, and that that trial has not resulted in a verdict. But I understand she still remains in custody under the original commitment; and if that be so, and there has been no trial resulting in a verdict, and there is nothing to show whether she is guilty or innocent of the charge which is made against her, I think she is properly in custody. Even supposing that there was great reason to doubt whether the judge was right in discharging the jury, still I think that the effect of that cannot be to get rid of a trial altogether; but I do not agree that there was anything wrong in the course pursued by the learned judge on this occasion. The facts here go further than they did in *Conway v. The Queen*. The replication in that case showed that the jury were discharged after a reasonable time had elapsed in the opinion of the judge and nothing more; but here it appears that the business of the assizes was over; the judge had nothing left to do but to take that verdict. Then what was he to do? He must take one or other of two courses. He must either have remained in the town until one of the jury was so ill, that a case of evident necessity arose, which seems absurd; or he must have taken the jury with him either to the border of the county, or if you please all round the circuit. Still the same question must at last arise, and at some time, unless they agreed, the jury must be discharged; but where the judge is called upon to go to the next circuit town, and the jury have remained in deliberation so long that all hope of their

coming to a verdict is at an end, I cannot see what necessity there is for the judge taking the jury away with him, or staying till one of the jury is so ill that they must be discharged. If the case occurred in the beginning or the middle of the assizes, and before the business was concluded, the judge acting upon his opinion that the jury had been detained a reasonable time, discharged them, the case would then fall within the decision of the Irish Court of Queen's Bench; but here is the additional fact, that the judge was about to depart to the next county; which brings this within the authority of several other cases. In *R. v. Shields* (28 St. Tr. 618), three prisoners were indicted for murder; two out of the three were acquitted; but the jury were unable to agree upon a verdict as to the third, and the judges, being about to depart from the county, and all the other business of the commission having been concluded, the jury were discharged. Upon the next trial the prisoner's counsel requested to have the rule discharging the former jury read; the rule was accordingly read; and it imported "that inasmuch as the jury could not in anywise agree, and that the justices were about to depart from the county, the business having been finished, the said jury were ordered to be discharged, and the prisoner Shields was thereby remanded, that he might abide his trial at the next sitting of the commission." (a) This case comes precisely within the facts of that case; and therefore I think that that evident necessity had actually arisen, which Mr. *Huddleston* admits to be a sufficient justification for discharging the jury.

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COLERIDGE, J.—I am of the same opinion. We must take it upon the statement and the affidavits that this person was committed by a justice's warrant on a charge of a capital felony. The case is therefore excepted out of the operation of the earlier sections of the Habeas Corpus Act (31 Car. 2, c. 2); and the time has not yet expired which would bring it within the 7th section of that act. This therefore is an application at common law; and the answer would be the return of the warrant, unless something is shown whereby it appears that that warrant has spent its force and no longer justifies the detention of the prisoner. It is accordingly said that that is so; because the jury have been discharged without any necessity or evident necessity. Now these are terms which have been so often used, and by such high authority, that it may seem presumptuous to question their correctness; but certainly if they are construed strictly, it is impossible to say that the jury, even in a capital case, cannot be discharged except in a case of evident necessity; for exceptions to the rule are admitted which certainly are not strictly cases of necessity. It seems to me that the question in every case, as was said in the judgment of Mr. Justice Foster in *Kinloch's case*, is whether, under all the circumstances, there has been a proper exercise of the judicial discretion; and that is the true question, which we have to consider in the present

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Coleridge. J.

(a) *Huddleston* mentioned that the objection was not taken by the prisoner's counsel in that case.

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case. Then what were the circumstances of this case? The jury were locked up from two in the afternoon to eight o'clock on the following morning; which nobody can doubt was a reasonable time for them to form their opinion. But in the morning they came into court and said that there was an irreconcilable difference of opinion amongst them; it was the last morning of the assizes; the duty of the judge called him to another place; but it is said that instead of then discharging them he might have taken them to the border of the county; and if he had so done and had then discharged them, I understand it to be conceded that he would have done rightly; but if that be so, if that would have been a proper exercise of discretion, can it be an improper exercise of discretion to have discharged them at once? I certainly think not; and we are not pressed at all by the decision of the Court of Queen's Bench in Ireland; because not only was the circumstance which I have mentioned, that the last day of the assizes had arrived, wanting in that case, but the absence of that fact was relied upon as a main ground of the judgment. Instead, therefore, of being an authority against our present decision, the inference from that case rather is that the inclination of those learned judges was in favour of the view which we have taken. I am glad that this case has been thoroughly sifted and discussed; because putting the decision as I do upon general grounds and holding that the judge has a discretion to exercise in every case, I think it of great importance that the exercise of that discretion, which is certainly liable to abuse, should be open to thorough examination in every case.

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Erle, J.

ERLE, J.—I am also of the same opinion. It appears to me that the word "necessity," as affording a rule to guide the judge in the exercise of his discretion as to discharging the jury, does not import an absolute inability to take any other course, but only need in a very high degree; and the judge must in every case exercise his discretion in deciding whether the circumstances amount to that degree of need. I doubt very much whether that discretion ought to be reviewed in this form; but if it is subject to that review, I think the decision of the judge was correct, and that there was in this case that degree of need which justified the discharge of the jury.

Rule discharged.

COURT OF QUEEN'S BENCH.

February 24, 1849.

REG. v. CHARRETIE AND OTHERS. (a)

*Sale of cadetcy in the service of the East India Company—Stat.
49 Geo. 3, c. 126.*

An indictment, under 49 Geo. 3, c. 126, s. 3, charged the defendant with receiving money "for the appointment and nomination of A. B. to a certain office, commission, place, and employment, then being under the appointment and control of the East India Company, to wit, the office, commission, place, and employment of a cadet in the service of the East India Company." It was proved that the directors of the East India Company in turn nominated persons as cadets, and certified that they were eligible for that station, and that the persons so nominated were always appointed by the company; that, upon this appointment they received a certificate which, upon their arrival in India, entitled them, as vacancies occurred, to commissions in the military service of the company.

Held, that a cadetcy was, within the meaning of the statute, an "office, commission, place, and employment."

THE first count charged that John Charretie, late of London, master mariner, J. R., late of the same place, gentleman, and A., the wife of A. S., late of the same place, heretofore, to wit, on the 1st day of November, in the eighth year of the reign of our Sovereign Lady Queen Victoria, with force and arms, at London aforesaid, and within the jurisdiction of the said court, unlawfully and corruptly did receive, have, and take from one William Witherspoon reward and profit, to wit, a sum of money, to wit, the sum of 2,000*l.* of the moneys of the said William Witherspoon, *for the appointment and nomination of a certain person, to wit, one William White Witherspoon, to a certain office, commission, place, and employment, then and there being under the appointment and control of the East India Company, to wit, the office, commission, place, and employment of a cadet in the service of the East India Company, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity. And that Sir William Young, bart., late of London aforesaid, then and there, to wit, on the day and year aforesaid, with force and arms, at London aforesaid, and within the jurisdiction of the said court, unlawfully, wilfully, and knowingly did aid, abet, and assist them*

Indictment.

First count.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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the said John Charretie, James Rallett, and Anna Stewart, the offence and misdemeanor aforesaid to do and commit, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

The seventh count charged that the said John Charretie, James Rallett, Anna Stewart, and Sir William Young, bart., being evil disposed persons, heretofore, to wit, on the day and year aforesaid, with force and arms, at London aforesaid, and within the jurisdiction of the said court, unlawfully and corruptly did, amongst themselves, and with divers other evil disposed persons, to the jurors aforesaid unknown, conspire, combine, confederate, and agree together, unlawfully and corruptly to bargain for the sale of a certain other *office, commission, place, and employment*, then and there being under the appointment and control of the East India Company, to wit, *the office, commission, place, and employment of a cadet* in the service of the said East India Company, in contempt of our said lady the Queen and her laws, to the evil example of all others, and against the peace of our said lady the Queen, her crown and dignity.

Upon the trial, which took place before Lord Denman, C. J., in London, during the sittings after Hilary Term, 1848, the defendant, Charretie, was found guilty upon the first and seventh counts only. The father of William White Witherspoon proved that he had paid a large sum of money to the defendant and others for procuring the appointment of the said William White Witherspoon as a cadet in the service of the East India Company; and it was also proved that the appointment was obtained on the nomination of Sir William Young, a director of the East India Company. It appeared that with regard to cadetcies in the company's service, the practice was that each of the directors nominated in turn, and that if the party nominated was eligible, the company invariably appointed the nominee.

The following is the form of petition and nomination.

"Madras or Bombay. The Hon. Court of Directors of the East India Company. The humble petition of William White Witherspoon sheweth, that your petitioner is desirous of entering the military service of the company as a cadet for the Madras Infantry, to which he has been nominated by Sir William Young, bart., at the recommendation of his father; and should he be so fortunate as to appear to your honours eligible for that station, promises to conduct himself with fidelity and honour. That your petitioner has been furnished with the articles of war, as also the terms and resolutions of the court of the 9th of August, 1809, and the 7th of March, 1823, by which latter resolution it is required that he shall 'as a condition to his appointment subscribe to the military fund of his respective presidency,' to which he promises faithfully to conform, as also to all the rules, orders, and regulations which have been or may be established by the Hon. Court, or the Governor and Council at the Presidency to which he is appointed."

Immediately following this was the declaration of the defendant, Sir William Young,

"Director's Nomination.—I, Sir William Young, bart., being one of the directors of the East India Company, beg leave to present the petitioner, William White Witherspoon, as a cadet for the Madras Infantry, on one of my nominations for the season, provided he shall appear eligible to you for that station; and I do declare that from the character given of him by his father, who certifies that he is well acquainted with his family, character and connections, he is, in my opinion, a fit person to petition the East India Company for the appointment he now solicits.

"Recommended to me by his father.

"WILLIAM YOUNG.

"Examined and passed the 27th of November, 1844, by J. C. W., A. H., St. G. T."

The examination of the cadet was signed at the foot by the defendant, Sir William Young, and was as follows:—

(Instructions for filling in the answers. The answers to the following questions must be written by the cadet himself, in the presence of one of the clerks of the Cadet Office.)

"Examination of (*here insert your names*), cadet, William White Witherspoon."

(Insert name of the director, and against the answer write the name of the person who recommended you to the director.)

Q. Who recommended you to Sir William Young, bart., the Evidence nominating director for this appointment?

A. My father.

The questions must be answered decidedly, as by the resolution of court of the 9th of August, 1809, you will be subject to dismissal if your appointment has been obtained by improper means.

Q. Do you believe that any person has received or is to receive any pecuniary consideration, or anything convertible in any mode into a pecuniary benefit on account of your nomination?

A. No.

Q. Are you aware that if it should be hereafter discovered that your appointment has been obtained by improper means, you will be dismissed and rendered ineligible to hold any situation in the company's service again?

A. Yes.

Cadet's signature, WILLIAM WHITE WITHERSPOON.

"I do hereby declare, to the best of my belief, that the petitioner's answers to the foregoing questions are correct.

(Signed)

"WILLIAM YOUNG."

Thereupon the nominee was, as usual, entered as a cadet; and received a certificate on parchment, which authorized him to go to India, and entitled him, after his arrival there, to receive in his turn a commission in the military service of the company. The certificate was not produced upon the trial, nor the exact form of it proved. A rule nisi having been obtained on behalf of the defen-

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dant Charretie, to set aside the verdict for the crown on the 1st and 7th counts of the indictment, and to enter it for the defendant, or for a new trial,

The *Attorney-General*, Sir F. Thesiger, Clarkson, Peacock, and Forsyth, showed cause during last Michaelmas term (Monday, Nov. 20.)—The 1st count of this indictment is founded on the 49 Geo. 3, c. 126, s. 3, which makes it a misdemeanor to receive, have, or take any money, profit, or reward for the appointment and nomination of any person to any office, commission, place, or employment under the control of the East India Company; and the main question is, whether a cadetcy is an office, commission, place, or employment within the meaning of that section. The words are very general, and quite large enough to include a cadetcy, which is in truth the first step in the military service of the company. It is treated by the company as a distinct office, and is recognized by the Legislature as the subject of an appointment: (Stat. 33 Geo. 3, c. 52, ss. 59, 60.) [COLERIDGE, J.—Is a cadet bound to report himself on his arrival in India? Is he under command before he gets his commission?] No evidence was given upon that point, nor as to the time when his pay commences; but the fact is, that the pay commences as soon as he embarks for India, although his passage-money is not paid. His duty is not to loiter by the way. [Crowder, for the defendant.—The certificate which he takes with him should have been produced.] It was probably destroyed as useless as soon as the commission was obtained. 2. Another ground, upon which this rule was obtained, was, that Sir W. Young had no power of appointment, and that therefore the offence was not complete; that he could only *nominate*; and that the receipt of money for a nomination to an office was, if at all, an offence under the 4th, and not the 3rd section of the statute; but the answer is, that in this case the money was paid for an appointment, not a mere nomination; and it is immaterial whether Sir William Young could appoint. It is clear, however, that in effect he had the appointment, for every thing proceeded upon his nomination. At all events, the indictment is proved, for both the 1st and 7th counts allege that the appointment was under the control of the East India Company; and the 7th would be sufficient either under the 3rd or 4th section of the statute. (They referred to *Hibblewhite v. M' Morine*, 5 M. & W. 462.)

Crowder, and *Warren*, contra.—The main ground upon which this rule was obtained is this—that the prosecution gave no evidence to show that a cadetcy was within the statute. The certificate on parchment, at least, should have been produced; or, if destroyed, secondary evidence of its contents given. The term "*cadet*" does not in itself signify any *office, commission, place, or employment*; on the contrary, it is defined in several dictionaries to mean "a volunteer in the army, who serves in expectation of a commission;" (they referred to Johnson's Dict.; Richardson's Dict.; Encyclopædia Americ.; and Jacob's Law Dict.) and that

definition is correct. He gets no pay; and on his arrival in India there may be no vacancy. Before he obtains a commission, he may change his mind. A cadet is, in truth, only an admitted candidate for a commission; or, if he is more than that, the prosecution should have proved it. The statute referred to (33 Geo. 3, c. 52, ss. 59, 60) does not use any of the four terms used in this indictment, but speaks of persons being appointed "*in the capacity of cadets*." [COLERIDGE, J.—The petition of the candidate, which was in evidence, speaks of *entering the military service of the company as a cadet for the Madras infantry*.] If a cadet is properly described as a person serving in expectation of a commission, then the terms of the petition cannot alter the fact. [ERLE, J.—What definition can you give of the word *place*, which excludes this?] There cannot be a *place* without duties and without emolument. [ERLE, J.—A cadet would violate his duty, if he went to New York instead of the East Indies.] He would lose his commission; that is all. The words of a penal statute are to be construed strictly. At all events the 1st and 7th counts are not proved. The 1st count is framed under sect. 3 of 49 Geo. 3, c. 126; which applies to the receipt of money for appointing and nominating to a place, by the person who has the right of appointment, and is intended to prevent the sale of patronage by the person who has it. That section, therefore, does not apply to this case; because Sir W. Young had not, but the East India Company had, the right of appointment. The 4th section of the statute, which prohibits the receipt of money by any person using his *interest, solicitation, petition, or request*, is the section applicable to a case like the present. The 7th count is open to the same objection; it charges a conspiracy to bargain corruptly for the sale of "an office, commission, place, and employment;" and Sir W. Young had no office to sell. In both counts the cadetcy is described as an "office, commission, place, and employment," and it is, therefore, not enough that it should fall under one or two or three of those terms; it must answer all four, or the indictment is not proved: (*R. v. Joyce*, 1 Russ. on Crimes, 86; *R. v. Williams*, 2 Car. & K. 51.) [LORD DENMAN, C. J.—In *Reg. v. Gilchrist* (1 Car. & M. 224), the same point was made, but the instrument was held there to be both a *warrant* and an *order* for the payment of money, so that it answered the description in the indictment. But has it ever been held necessary to prove all the terms, by which a thing is described? WIGHTMAN, J.—In the case of *R. v. Williams*, I thought that if the instrument answered one term only, there was a misdescription. *R. v. Crowther* (5 Car. & P. 316) is another case in which the instrument answered both descriptions, "*warrant and order*;" but I am not aware of any case in which it has been held enough, if the instrument fulfilled only one of the terms applied to it. *Davison, amicus curiæ*, mentioned that he had cited *R. v. Williams* before Cresswell, J. who had declined to act upon it; but had expressed his intention of conferring with Wightman, J., on the subject.]

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JUDGMENT.

Judgment.

LORD DENMAN, C. J. now delivered the judgment of the court. — This was an indictment under the 49 Geo. 3, c. 126, which extends the provisions of the 5 & 6 Edw. 6, c. 16, to offices, commissions, places, and employments in the appointment of the East India Company. It charged the defendant with receiving money for an appointment and nomination to a certain office, commission, place, and employment, to wit, the office, commission, place, and employment of a cadet in the East India Company's service. The only question remaining, after much ingenious discussion at the bar, was, whether a cadetship was proved at the trial to fall under any one of these several terms. The money was to be paid for the nomination; and it was perfectly clear from the official documents themselves, that the directors have the power to nominate, and that in this instance the director's nomination was made in favour of Mr. Witherspoon, whose father paid 1,000*l.* for him as a cadet in the Madras infantry. A proviso to the nomination is annexed; that is, provided he shall appear eligible for the situation, but all nominations are made subject to that condition. In determining whether a cadetship falls under the act, as an *office, commission, place, or employment*, we must consider the object of the enactment. It was undoubtedly to prevent all corrupt bargains for the sale of patronage in matters of public concerns; and with this view it is immaterial to inquire whether that to which the nomination is sold can be described with the most critical correctness by any one of these terms, rather than by another: each of them may have an appropriate technical meaning, and yet may, with sufficient accuracy, answer the general intention of the act. And to this extent we think the description is right. In common parlance, we should not ordinarily say that a military officer holds an office, or that a judge holds a commission; yet that language might properly be used respecting them, and the words *place* and *employment* are so general as to comprehend every kind of advantageous position which a party can obtain by nomination to a specific thing. A cadetship in the Madras infantry is truly described, we think, by each of these words. Each is applicable, and plainly each relates only to one place and to one transaction. We think the indictment, therefore, fully proved; and we wish to add that our judgment in this and some other cases has been delayed by an accidental circumstance, and not by any doubt on the case.

Rule discharged.

HOME CIRCUIT.

ESSEX LENT ASSIZES, 1849.

March 7.

(Before PARKE, B.)

REG. v. GEORGE PRESTNEY. (a)

Lawful apprehension—Stats. 7 & 8 Geo. 4, c. 30, and 1 & 2 Will. 4, c. 32.

To justify the apprehension of an offender, under 1 & 2 Will. 4, c. 32, s. 31, it is only necessary that he should have been made to understand, by the person authorized under that section, that he is required to tell his Christian name, surname, and place of abode, and that he should have refused to comply with such requisition. It is not necessary that he should have been required both to quit the land and also to tell his name.

Damage done to a fence by a poacher's dog in pursuit of game, is not a "malicious" injury within the meaning of stat. 7 & 8 Geo. 4, c. 30, s. 23.

THE prisoner was indicted for feloniously cutting and wounding James Purkiss. The first count alleged an intent to prevent the prisoner's lawful apprehension and detainer; the second, an intent to disable James Purkiss; and the third, an intent to do grievous bodily harm to James Purkiss.

It appeared that the prosecutor found the prisoner in a field which was in the occupation of the prosecutor, engaged with another man in ferreting for rabbits in the hedge of the field. They had a dog with them, which had done some slight damage to the hedge in two or three places by breaking through it. In the course of his examination, the prosecutor deposed as follows:—"I did not at first ask the prisoner his name, or tell him to leave the premises, but I ran after him and seized him by the coat. When I first ran towards him he tried to get away. When I had seized him, I said to him, I will find out who you are. We had a struggle, and he fell. I held him down and struggled with him. I said to him, I will not let you go until I find out who you are. I should have let him go if he had told me his name. I did not want to apprehend him. I told him it was my field, but I did not ask him to quit it. I only wanted to know his name. He could not, I think, help understanding that I wanted his name. It was well known

(a) Reported by PAUL PARNELL, Esq., Barrister-at-Law.

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in the neighbourhood that it was my field. After this I continued to hold him for a minute or two. He then got his hand loose, and got his knife and stabbed me two or three times in the left arm."

Rodwell, for the prisoner, submitted that the charge could not be sustained for more than a common assault. The apprehension and detainer of the prisoner by the prosecutor being both unlawful; for that by the statute 1 & 2 Will. 4, c. 32, s. 31, before apprehending the prisoner, the prosecutor was bound to ask his Christian name, surname, and place of abode, and also to require him to quit the land. The words of the statute are "that where any person shall be found on any land in the day time, in search or pursuit of game or woodcocks, snipes, quails, landrails, or conies, it shall be lawful for the occupier of the land to require the person so found forthwith to quit the land whereon he shall be so found, and also to tell his Christian name, surname, and place of abode; and in case such person shall, after being so required, offend by refusing to tell his real name or place of abode, or by giving such a general description of his place of abode as shall be illusory for the purpose of discovery, or by wilfully continuing or returning upon the land, it shall be lawful for the party so requiring as aforesaid to apprehend such offender, and to convey him before a justice of the peace," &c.

T. Chambers, for the prosecution, contended that the arrest of the prisoner was lawful, either under the statute referred to or even under stat. 7 & 8 Geo. 4, c. 30. With reference to the last point, he cited sect. 23 of that statute, which makes it an offence "unlawfully and maliciously to cut, break down, or in anywise destroy any fence of any description, or any part thereof;" and sect. 28, which, for the more effectual apprehension of all offenders against the act, gives power to the owner of the property injured immediately to apprehend, without a warrant, any person found committing any offence against the act; and he contended that the injury done to the hedge by the dog was an offence within sect. 23.

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Parke, B.

PARKE, B.—The question is, whether the apprehension or detention were lawful, and they are said to have been lawful upon two grounds: First, under the stat. 7 & 8 Geo. 4, c. 30; and, secondly, under the stat. 1 & 2 Will. 4, c. 32. With regard to the first statute, I think that would furnish no justification to the arrest. To constitute an offence under that act, the injury done must be unlawful and *malicious*; it must be a wanton act of cutting or the like, with the object of doing damage to the thing injured. Here there was no spiteful object in damaging the fence; it was done merely in prosecution of the intention to kill the game or rabbits. The next question is, whether the apprehension or detention were lawful under stat. 1 & 2 Will. 4, c. 32. The first apprehension of the prisoner, by seizing him by the coat, was plainly wrongful. But the detention may be lawful. I do not think the construction to be put upon the act is, that the prosecutor was bound both to require the prisoner to quit the land and also to

tell his name and place of abode, but that he was at liberty to require either of those two matters of the prisoner, and that the prisoner was bound to comply with whichever the prosecutor demanded. Then, did the prosecutor require him to tell his Christian name, surname, and place of abode? If the jury are satisfied that, before any of the wounds were inflicted, the prosecutor had conveyed to the prisoner that he wanted to know the prisoner's Christian name, surname, and place of abode, and that the prisoner understood what was required of him, but refused to comply with it, then the detainer would be lawful, and the prisoner might be convicted upon the 1st count. And upon this question the expression "I will not let you go until I find out who you are," will be evidence for their consideration. (a)

Verdict—*Guilty upon the first count.*

Sentence—*Transportation for seven years.*

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HOME CIRCUIT.

KENT LENT ASSIZES, 1849.

March 16.

(Before WIGHTMAN, J.)

REG. v. MILLEN AND ANOTHER. (b)

Confession—Inducement.

A statement made by one of two prisoners to the other after an inducement suggested by that other in the presence of the constable in whose custody they are, and uncontradicted by the constable, is inadmissible in evidence.

GEORGE MILLEN and Henry Sheepwash were indicted for the wilful murder of William Law at Bethersden, in the county of Kent. It appeared that upon the 9th of February the

(a) This ruling is repugnant to the reported ruling of Williams, J., in *Rex v. Long* (7 C. & P. 314); and Wightman, J., in *Reg. v. Lawrence* (Gloucester Spring Assizes, 1843; 1 Russell on Crimes, Greave's edit., Addenda, xi.) The circumstances of the former case were very similar to those in *Reg. v. Prestney*, as there the prosecutor had told the prisoner "he should like to know his name," to which the prisoner seems to have given no answer. But the decision, in the principal case, seems more consistent with the language of the statute and with common sense. The object of the enactment being to ensure the punishment of the offender, it seems difficult to imagine that it was intended that an offender who refused to give his name should be invited and required to quit the land and so escape before it could be lawful to apprehend him. As to the mode in which the demand of name and place of abode is to be made, there is nothing in the act pointing to any set form of expression.—NOTE BY THE REPORTER.

(b) Reported by PAUL PARNELL, Esq., Barrister-at-Law.

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Inducement.*
—

prisoner Sheepwash was in custody upon this charge, together with a man named Thomas Oliver, who was not included in this indictment. Oliver and Sheepwash were being conveyed from Bethersden to Ashford, a distance of six or seven miles, in the charge of a man named Edward Taunton, the constable of Bethersden. George Taunton, the son of the constable, was driving the cart, but Edward Taunton, the constable, was sitting immediately behind and could hear all that passed. Oliver said to Sheepwash, "You had better speak the truth." Neither Edward Taunton nor George Taunton made any remark. Sheepwash then made a statement which all the others who were in the cart heard.

Deedes and Tassell, for the prosecution, proposed to put this statement in evidence.

T. Chambers, for the prisoner, objected that this was a statement made after an inducement sanctioned by the constable, and was therefore inadmissible.

The following cases were cited: *Reg. v. Sarah Taylor*, 8 C. & P. 733; *R. v. Spencer*, 7 C. & P. 776; *R. v. Thomas*, *ibid.* 345; *R. v. Court*, *ibid.* 496; *Garner's case*, 1 D. C. C. 329.

WIGHTMAN, J., retired to consult Parke, B., who was sitting in the other court, and, upon his return, ruled that the evidence was inadmissible, as the inducement held out to Oliver appeared to have the sanction of the constable who was present and apparently assented to it.

It then appeared that, the same evening, after Oliver and Sheepwash had reached Ashford, and while they were at the house of one Vile, the constable of Ashford, Sheepwash made another statement, before which Vile, the constable, said to him, "You need not say anything unless you like."

The two prisoners, Edward Taunton the constable, and his son, left Bethersden at eight in the evening; they arrived at Ashford in the cart about nine o'clock; the conversation, in which this statement was made took place at about eleven o'clock.

WIGHTMAN, J.—Held, that this statement was inadmissible as being connected with the same inducement as the former.

Verdict—*Both guilty.*

Sentence—*Death.*(a)

(a) George Millen was accordingly executed at Maidstone; but Henry Sheepwash was reprieved by Her Majesty, and subsequently was transported for life.

CENTRAL CRIMINAL COURT.

SEPTEMBER SESSION, 1848.

(Before ERLE and WILLIAMS, JJ.)

REG. v. DOWLING. (a)

Indictment under 11 & 12 Vict. c. 12—Prisoner's right to have indictment read over—Right to a copy of the jury panel—To examine a juror on the voire dire—Levying war against the Queen—Distinction between a spy and an accomplice.

On a trial for felony the prisoner is entitled to have the indictment read over slowly once, and once only.

The prisoner is not entitled to a copy of the jury panel; a juror cannot be examined on the voire dire without cause being first shown. To constitute a levying of war under the 11 & 12 Vict. c. 12, it is not necessary that there should have been any actual conflict. Any attempt by force or intimidation to interfere with the free action of the Government is a "levying war" within the meaning of the above act. Any attempt to substitute another form of Government for the existing one, or to dismember the United Kingdom, is sufficient to sustain a count under the above act charging the intent to be to depose the Queen, &c.

If several persons join in the same conspiracy, some intending by the means employed to force the Government to change their measures, whilst the object of others is to sever Ireland from England, each is responsible for both intents. A person who enters into a conspiracy for the sole purpose of detecting and betraying it, does not strictly require confirmation as an accomplice, although his evidence should be received by the jury with caution.

THE prisoner was indicted under the Crown and Government Security Act, the 11 & 12 Vict. c. 12. Indictment may be read once only.

Before the trial commenced,

Kenealey, for the prisoner, desired that the indictment might be read over three times slowly, in order that it might be taken down in writing. He had been refused a copy of the indictment, and was compelled therefore to assert a right which the prisoner possessed.

ERLE, J.—In consequence of it having been suggested yesterday that this application would be made, I have looked into the cases, and am of opinion that the prisoner can only demand to have the indictment read over once. It is absurd to suppose that you are entitled to have the same thing read over three times.

Kenealey submitted that the prisoner had a common law right to that which he claimed. There were several cases in the state trials in which the indictment had been read over twice, and in

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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some instances three times: (*Weston's case*, 2 St. Tr. 912, 923; *Vane's case*, 6 St. Tr. 132; *Rosewill's case*, 10 St. Tr. 152; *Graham's case*, 12 St. Tr. 815; *Ratcliffe's case*, Fost. Cr. L. 40, 42.)

ERLE, J.—Were not those cases in which the indictment was in Latin, the second reading was that of a translation into English, and the third when the prisoner was given in charge to the jury?

Kenealey said that such was the case in some instances, but there were cases where it had been read twice in Latin, and once in English; but the principle was that a prisoner should have the fullest opportunity of knowing the nature of the charge against him.

ERLE, J.—I rule in accordance with the authorities and with universal practice, that the indictment be read slowly over once, and once only.

Jury panel.

Kenealey then applied for a copy of the jury panel. He was entitled to it in case of treason, and this was substantially that offence.

ERLE, J. (after consulting *Williams, J.*)—This is an ordinary case of felony, and the proceedings must be conducted in precisely the same way as on a trial for such a charge. We therefore refuse the application.

Voire dire.

Upon a juror being called into the jury box,

Kenealey required that he might be sworn on the *voire dire*, in order that he might examine him with a view to a challenge, if necessary. [ERLE, J.—You cannot do that without first stating some ground for the proceeding.] He may have been a special constable, and, if so, I should certainly challenge him; but I cannot say I have any instructions with regard to this particular individual.

ERLE, J.—Then I must refuse your application, unless, indeed, you can quote some authority on the subject. I think it a very unreasonable thing that a jurymen should be cross-examined without your having received any information respecting him.

A jury having been formed, the prisoner was then given in charge upon the following indictment:—

Indictment.
1st count.

Central Criminal Court, to wit.—The jurors for our lady the Queen, upon their oath present that Alfred Dowling, late of the parish of Christchurch, in the county of Surrey, labourer, with several others named, being subjects of our said lady the Queen, not having the fear of God before their eyes, nor weighing the duty of their allegiance, but wholly withdrawing the love, obedience, fidelity and allegiance which every true and faithful subject of our said lady the Queen should and of right ought to bear towards our said lady the Queen, heretofore and after the passing of an act of Parliament made and passed in the eleventh year of the reign of Her present Majesty, intituled "An Act for the better Security of the Crown and Government of the United Kingdom," to wit, on the fifteenth day of August, in the year of our Lord one thousand eight hundred and forty-eight, and on divers other days and times as well before as after that day, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction

of the said court, wickedly and feloniously, amongst themselves and together with divers other evil disposed persons to the jurors aforesaid unknown, did compass, imagine, invent, devise and intend to levy war against our said lady the Queen within that part of the United Kingdom of Great Britain and Ireland called England, in order by force and constraint to compel her to change her measures and counsels, and the said compassing, imagination, invention, device and intention did then and there express, utter and declare, by divers overt acts and deeds hereinafter mentioned; that is to say, in order to fulfil and perfect and bring to effect their felonious compassing, imagination, invention, device and intention aforesaid, they the said Alfred Dowling, and the others, on the said fifteenth day of August, in the year of our Lord aforesaid, and on divers other days and times as well before as after that day, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, wickedly and feloniously did assemble, meet, conspire, consult and agree amongst themselves, and together with divers evil disposed persons to the jurors aforesaid unknown, to stir up, raise, make and levy insurrection, rebellion and war against our said lady the Queen within this realm, and to overthrow and destroy the constitution and government by law established within this realm; and further, to fulfil, perfect and bring to effect their felonious compassing, imagination, invention, device and intention aforesaid, they the said Alfred Dowling, and the others mentioned, on the said fifteenth day of August, in the year of our Lord aforesaid, and on divers other days and times as well before as after that day, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, wickedly and feloniously did purchase, procure, provide, and have divers large quantities of arms, to wit, swords, daggers, pikes, bayonets, guns, and pistols, and divers large quantities of ammunition, to wit, gunpowder, leaden bullets, and shôt, with intent therewith to arm themselves and other evil disposed persons, in order to attack, resist, fight with, kill and destroy the soldiers, troops, and forces of our said lady the Queen, and the police constables and peace officers acting in the execution of their duty within this realm; and to raise, make and levy insurrection, rebellion and war against our said lady the Queen within this realm; and further, to fulfil, perfect, and bring to effect their felonious compassing, imagination, invention, device and intention aforesaid, they the said Alfred Dowling, and the others mentioned, on the said fifteenth day of August, in the year of our Lord aforesaid, and on divers other days and times as well before as after that day, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, wickedly and feloniously did assemble, meet, conspire, consult, and agree together amongst themselves, and together with divers other evil disposed persons to the jurors aforesaid unknown, to set fire to, burn, and destroy divers police stations, railway stations, houses and buildings, and

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to provide and prepare divers combustibles and materials for the purpose of setting fire to, burning, and destroying the same; and further, to fulfil, perfect and bring to effect their felonious compassing, imaginations, invention, device and intention aforesaid, they the said Alfred Dowling, and the others mentioned, on the said fifteenth day of August, in the year of our Lord aforesaid, and on divers other days and times as well before as after that day, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, wickedly and feloniously did enrol themselves as, and became and were, members of divers unlawful, secret and dangerous associations, clubs and confederacies, holding secret correspondence and communications with each other, for the purpose of organizing, raising, making and levying insurrection, rebellion, and war within this realm: in contempt of our lady the Queen and her laws, to the evil example of all others in the like case, offending against the form of the statute in that case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

Indictment.
2nd count.

The 2nd count averred the compassing and intent to be to deprive and depose our Sovereign lady the Queen from the style, honour, and royal name of the imperial crown of the United Kingdom of Great Britain and Ireland, and was in all other respects the same as the 1st count.

Stat. 11 & 12
Vict. c. 12, s. 3.

The indictment was preferred under the 3rd sect. of 11 & 12 Vict. c. 12, which enacts "that if any person whatsoever, after the passing of this act, shall, within the United Kingdom or without, compass, imagine, invent, devise or intend to deprive or depose our most gracious lady the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of her Majesty's dominions and countries, or to levy war against her Majesty, her heirs or successors, within any part of the United Kingdom, in order, by force or constraint, to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe both houses or either house of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other her Majesty's dominions or countries, under the obedience of her Majesty, her heirs or successors, and such compassings, imaginations, inventions, devices or intentions, or any of them, shall express, utter or declare by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony," &c.

Evidence.

The evidence showed that the prisoner, with many other persons, some included in this indictment, and some not, had organized large bodies of men, some as chartists, some as Irish confederates, with the view of obtaining by any means the people's charter and the repeal of the union respectively; that they had clubs, with class leaders, wardens, delegates, &c.; that they held meetings, at which they were harangued and organized; that they had raised

parties of fighting men, parties who were to burn houses, &c., to create a diversion in favour of those fighting, and, finally, that it was agreed the attempt should be made on August 16th, on which night a considerable number of the conspirators were found at the several appointed places of meeting, provided with arms, combustibles, &c. Powell, who joined the conspiracy, as he said, only to betray it, was the principal witness.

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Kenealey, in his address to the jury, contended that it was necessary for them to be satisfied, before they could convict the prisoner, that he had intended to levy war against his Sovereign, and to overthrow the crown and government of the realm, or to levy war against the Queen, to compel her to change her measures. The question was not whether there was a conspiracy, whether a number of pikes and bludgeons, or a mass of combustibles, were collected together. The nature of treason was defined by the 25 Edw. 3 to be the levying war against the Sovereign, or adhering to his enemies. Nothing is said about conspiracy. There were several subsequent acts extending the definition, but these were all repealed by the 1st Edw. 6. The meaning of levying war is given by Lord Coke, and, after mentioning several instances, the reason he gives is this, because those who do these acts take upon them royal authority, which is against the King. [ERLE, J.—Lord Coke speaks of persons assembling together to take prisoners out of prison. Do not they assume that species of royal authority which Lord Coke intends? He surely cannot mean the assumption of all the power and authority of the Sovereign.] But Lord Coke goes on to say—there is a diversity between levying war and committing a great riot, a rout, or an unlawful assembly, and that, I apprehend, is the distinction here. The conspiracy, the riot, cannot be denied, but can this man be said to have contemplated the levying of war? Lord Hale says, in 1 Hale, 131, “But a bare conspiracy, or consultations of persons to levy a war, and to provide weapons for that purpose, though it may amount in some cases to an overt act of compassing the King’s death, yet it is not a levying of war.” He gives the instance of Hotspur having raised a rebellion against Henry 4th, when his father, the Earl of Northumberland, marched an army towards the contending parties, but, being intercepted by the Earl of Westmoreland, he returned home. There seemed to be little doubt that his object was to assist his son, although that object had not been declared; but it was declared that he had committed no treason; Lord Hale says, “It appears not what the reason of that judgment was, whether it was thought only a compassing to levy war, and no war actually levied by him,” &c. This was as strong a case as could be put to show the difference between a great riot and the levying of war. In this case the prisoner might have hoped by the demonstration proposed to call public attention to the miseries under which the lower classes laboured; he might, even with others, have sought to operate upon their fears; but this would not constitute a levying of war within the meaning of the statute.

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ERLE, J. (in summing up.)—The indictment is divisible into two distinct parts : first, the criminal intent : secondly, the overt acts, by means of which such intent was carried out. The law requires proof, to the satisfaction of the jury, that such intent existed, and that such overt acts were committed. The meaning of the part of the 1st count of the indictment, which charges the prisoner with the intention of levying war against the Queen, and compelling her by force to make changes in the constitution, though perfectly well understood by persons conversant with law, is in some respects different from the popular acceptance of the term. If you are satisfied that the prisoner has, with others, intended to use force to prevent the government from the free exercise of any of its lawful powers, the prisoner must be considered as having the intention under the statute to levy war against the Queen. It is not necessary that such persons should appear in arms—that they should appear in military array or display military banners. It is evident that numbers assembled without military discipline, and possessing only the arms which they themselves could furnish might produce a formidable contest and powerful resistance to the authorities. That there should have been an actual conflict is unnecessary. The basis of the crime is the intent, and as soon as such intent is evinced by acts the offence is complete, though no actual conflict has occurred. Much has been said respecting the similarity between the present offence and an ordinary riot. The distinction consists in the nature of the objects for which the parties assemble. If the purpose is a private one, the offence is a riot ; but if the purpose is public and general, it is a levying war. The same assembly with the same arms might, by a mere difference in the intent with which such an assembly was convened, be either a riot or a levying war. The object of the prisoner was alleged in the 1st count of this indictment to be to compel the Queen by force to change her measures and counsels. If that is established to your satisfaction there can be no doubt that it was a public purpose, and that the offence bears no relation to that of riot. If, then, the prisoner's intent was to interfere by force in any way with the free action of the government ; if the object was, for instance, to intimidate the government into granting the charter, or to obtain by violence and terror the repeal of the act of union between Great Britain and Ireland, or if the object was in any degree to interfere with the military posts,—if persons conspire for any of these purposes, and it is proved that their intention was to assemble in numbers and armed ; if their intention was to make what may be shortly termed insurrection, it must be considered a levying of war against the Queen within the meaning of the act. The question, therefore, as to the first part of the indictment, namely, the criminal intention, is whether the prisoner had or had not the intention of making an insurrection against the Queen or the government. The law further requires that such intention should be acted upon, for the intention is confined to the mind of the person who forms it, and no offence is committed until

this intention is acted upon and shown by some overt act; such overt act must be stated in the indictment and must be proved to the satisfaction of a jury. In this case four overt acts are charged, and if any one of them is clearly established to your mind, and is proved to have been done with either of the intents laid in the indictment, the prisoner is guilty. Another rule of law is, that if two or more persons engage in the pursuit of a common criminal purpose, and the jury are satisfied that they are so combined, then the act of any one of them in furtherance of that purpose, is the act of all. So in this case if it is made out to your satisfaction that the prisoner conspired with others with the purpose of making an insurrection, the act of any one conspirator in pursuance of such an object must be taken as the act of the prisoner; but it must first be proved that the prisoner conspired. The first overt act charged the prisoner that he with others consulted and conspired to raise, make, and levy insurrection, rebellion, and war against the Queen. The second charged him with conspiring with others to purchase and procure arms for the purpose of making an insurrection, &c. The third, that he with others did assemble, consult and conspire to set fire to several police stations, &c.; and the fourth, that he with others had enrolled himself as a member of divers illegal associations corresponding with each other for the purpose of organizing insurrection, &c. In the 2nd count the overt acts are identical; the intent only being varied. In order to make out the intent laid in the 2nd count, namely, the intent to deprive and depose the Queen from her name, style, and title of Queen of the United Kingdom of Great Britain and Ireland, it is for you to consider whether the prisoner, and the others with whom he acted, intended to subvert the monarchical institutions of the country. If this was the intention, they must have intended to deprive the Queen of her royal style and title—to depose her. If, moreover, the prisoner intended by force to sever Ireland from the Crown of England, or intended to take away the royal authority over Ireland, this also would amount to a deposition of the Queen from the style and title of the imperial crown of Great Britain and Ireland. If, in pursuance of any such intention, the prisoner has committed any one of the overt acts mentioned, the 2nd count is proved. Again, if you shall think that some of the parties entered into the conspiracy intending to resist the authority of the Queen in England, whilst others (not so much caring for this object, and indifferent whether it were effected or not,) intended to destroy the authority of the Queen in Ireland, co-operating by the same means to produce each the result he desired, and each careless whether or not the purpose of the others was effected, then both parties must be considered as adopting both purposes. In referring to the evidence of Powell, the learned judge said that, although he had been designated as a spy or traitor, and an accomplice, if his object in entering into the confederacy was not to deceive or entrap any one, but to serve his country, he was entitled to praise instead of

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censure. If he only lent himself to the scheme for the purpose of convicting the guilty, he was a good witness, and his testimony did not require confirmation as that of an accomplice would do: he was not an accomplice, for he did not enter the conspiracy with the mind of a co-conspirator, but with the intention of betraying it to the police, with whom he was in communication. At the same time, from the facts of his joining the confederacy for the purpose of betrayal, and that he had used considerable deceit by his own account in carrying out that intent, the jury would do well to receive his evidence with caution, seeing that it was probable on the face of it, and borne out as far as it could be by the other circumstances of the case.

The jury found the prisoner guilty.

The Attorney-General, Clarkson, Bodkin, Welsby, and Clerk, for the prosecution.

Kenealey for the defence.

CENTRAL CRIMINAL COURT.

SEPTEMBER SESSION.

September 21, 22, 25, 1848.

(Before PLATT and WILLIAMS, J.J.)

REG. v. LACEY, CUFFEY, AND FAY. (a)

Indictment under the 11 & 12 Vict. c. 12—Furnishing prisoner with copy—Right of prisoner to a list of the names and addresses of the witnesses at the back of the indictment—Right to inspect the names—Right to examine juror on the voir dire—Right to have the jury panel read over—Challenge—Declaration and acts of co-conspirators.

A prisoner charged under the above act is not of right entitled to a copy of the indictment, nor would the court exercise its discretion in his favour by awarding him a copy ex gratia (Erle, J.).

A prisoner indicted for felony is not entitled to a list of the names and addresses of the witnesses on the back of the indictment, but he will be allowed to inspect the indictment for the purpose of seeing the names of such witnesses (per Erle, J.). No juror can be challenged until a full jury appear in the box. The prisoner may, by permission of the court, have the jury panel read over before he is called upon to exercise his right of challenge. A jurymen cannot be asked whether he has not acted as a special constable during the disturbances connected with the charge in the indictment—but, semble, he may be asked whether he has ever expressed an opinion as to the guilt of the prisoners.

A witness for the prosecution proved that he attended a meeting at which several conspirators were present, but none of the prisoners were there: he received at that meeting a leaf of a book from one of those present, named Bezer, which was to serve as a passport to a meeting to be held a week or two afterwards. He attended the second meeting, produced the leaf that had been given him, and was admitted. The prisoners were not present, nor were they shown to have joined the conspiracy at that time.

Held, that the witness might state the substance of what Bezer told him when he gave him the leaf, and also what passed at the second meeting.

It was proved that on the evening of the 16th August, the time which had been fixed by the conspirators for a general outbreak, a large number of armed men were found assembled in a public house in Webber-street. None of these men had been previously connected by the evi-

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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dence with the conspiracy, neither did it appear that the house had ever been recognized as a place of meeting.
Held, that what was done and what was found in that house, were admissible in evidence.

Practice.

THE prisoners were indicted under the Treasonable Felony Act, and the bill having been found by the grand jury,

Ballantine, Huddleston, Parry, Metcalfe, and Parnell applied to the court on behalf of the several prisoners, that they might be furnished with copies of the indictment. The statute was a new one, and prior to its passing, the acts which now constituted a felony would have amounted to treason; and if that had been the charge against them they might have demanded a copy of the indictment as their right. There was an alteration in the name and punishment of the offence, but it was submitted that the mode of proceeding ought to remain the same as before. At all events if the prisoners could not claim it as a right, this was a case in which the court would, *ex gratia*, direct copies to be delivered. In the case of *Reg. v. Martin*, recently tried in Ireland under the same statute, a similar application was made, and the judges at once acceded to it.

Copy of
indictment
refused to
prisoners.

ERLE, J. (after consulting V. WILLIAMS, J.)—We see no reason why the practice in this case should vary from that in an ordinary felony. The Legislature has thought proper to reduce such offences from treason to felony, and that being the case, they must be treated in all respects as felonies. One result is, that a copy of the indictment is no longer to be delivered. There are persons who, forgetting the merits of a case, look to the indictment as a fruitful source of technical errors, and by availing themselves of them, justice is frequently defeated. We think we ought not to afford any unnecessary facility to such a course. In this case the facts stated in the indictment must be known because they are of course the same as those taken in the informations before the magistrates. The prisoners, therefore, cannot be prejudiced in their defences.

September 22.

List of witnesses
on the back of
the indictment
refused.

Ballantine (with whom was *Parnell* for the prisoner *Lacey*) required to be furnished with a list of the names and addresses of the witnesses on the back of the indictment. The depositions contained the names of but few of those who had been examined before the grand jury, and it was most important for the interests of the prisoners that they should have an opportunity of inquiring into the characters of all those who were to appear against them.

ERLE, J.—This case must be tried like any other case of felony, and there is no precedent for yielding to this application.

Indictment may
be inspected.

Ballantine asked at least to be permitted to inspect the back of the indictment, and see the names of the witnesses there mentioned.

ERLE, J.—I see no objection to that. I think it is the ordinary course of proceeding.

September 25.

Upon a juryman being called into the box,
Ballantine proposed to ask him a question on the *voir dire*.

The Attorney-General objected to his doing so.

Ballantine, Huddleston, Parry, Metcalfe and *Parnell* were heard on behalf of the prisoners, and cited, in support of the right to put the question, 1 Co. Litt. 158 *a.*, 158 *b.*, where it was said, "If the cause of challenge touch the dishonour or discredit of the juror, he shall not be examined upon his oath, but in other cases he shall be examined upon his oath to inform the triers."

The Attorney-General contended that some cause of challenge must be shown, and the challenge then put upon record.

PLATT, B.—The present is not the proper time for challenging. You must wait until twelve juryman appear in the box. Challenging
the jury.

Huddleston and *Parry* then required that the whole jury panel should be read over before the prisoners were called upon to challenge, and cited *Chitty's Cr. Law*, 546, 550; Co. Litt. 158 *m.*, 287; Bac. Abr. 574; Fost. Cr. Law, 7.

The Attorney-General resisted the application. The panel was always called over once at the beginning of the session, and that was all that was requisite.

Ballantine urged that the reading which was required was a reading in the presence of the prisoner, otherwise it was of course useless to him. It was required not as a mere matter of form but for the protection of parties charged with offences.

The Attorney-General said that, as it appeared from a passage in *Hawk. P. C.*, cited in *Chitty's Cr. Law*, that the panel might be read over by leave of the court, he should offer no further opposition.

The panel was accordingly read over.

Ballantine then challenged John Pickworth, "for that the said J. P. does not stand indifferent between the crown and the prisoner."

The Attorney-General pleaded "that the said J. P. does stand indifferent between the crown and the prisoner."

Two triers were then sworn to try the issue joined on this plea; one being a juryman previously sworn without objection, and the other being selected by the learned judges.

The juryman was then sworn, and was asked by *Ballantine* the following question: "During the recent disturbances, have you acted as a special constable?"

The Attorney-General objected to this question as being one totally irrelevant.

PLATT, B.—It is a question which has nothing whatever to do with the issue, and I cannot allow it to be put.

Ballantine then asked, without objection being made, whether the juryman had ever expressed any opinion as to the guilt of the prisoners?

The prisoners' challenges becoming at length exhausted, a full

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jury was obtained. The prisoners were then charged upon the same indictment as that set forth in *R. v. Dowling, ante*, p. 509.

The indictment was framed upon the 3rd sect. of the 11 & 12 Vict. c. 12, which enacts, "That if any person whatsoever, after the passing of this act, shall, within the United Kingdom or without, compass, imagine, invent, devise or intend to deprive or depose our most gracious Lady the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe both houses or either house of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other of her Majesty's dominions or countries under the obeisance of Her Majesty, her heirs or successors, and such compassing, imaginations, inventions, devices or intentions, or any of them, shall express, utter or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony."

Evidence.

It was proved that the prisoners, from July 26 to August 16, had been in the habit of attending meetings where plans for securing the "People's Charter" and the "Repeal of the Union" were suggested and organized. That the prisoners took a prominent part at such meetings; that large bodies of men were formed into societies, with class leaders, wardens, delegates, &c.; that some of the members of such societies were selected and organized as fighting men; others were instructed in erecting barricades, firing houses, and scattering grenades; that an attempt at insurrection was to be made in the night of the 16th of August; and that on that night a great number of the conspirators were found at the several places of meeting previously marked, they being amply provided with arms and combustible materials.

Powell, one of the witnesses for the prosecution, stated that he attended a meeting at which several conspirators were present, but neither of the prisoners at the bar was there; he had received at that meeting a leaf of a book from one of the persons present named Bezer, which was to serve as an introduction or passport to a meeting to be held a week or two afterwards. On the 20th of July he attended the second meeting; was asked for his credentials, and produced the leaf that had been given him. Payne, the chairman of that meeting, then compared the leaf with a book which he had in his hand, and upon that the witness was admitted. The prisoners were not shown at that time to be parties to the conspiracy. The witness was now asked what Bezer said to him when he gave him the leaf, and also what took place at the second meeting, which was held at a public-house called the Black Jack.

Ballantine contended that these questions could not be asked

The question was, how conversations of other persons could be brought to bear upon the issue then to be tried. If the prisoners had been proved to have been then parties to the conspiracy, there could be no ground for objection; but it could not be shown that they were at that time implicated in the common design, and, therefore, were not answerable for the conduct of other parties.

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PLATT, B.—We do not see how the *Attorney-General*, without having made those defendants parties to the conspiracy on the 20th of July, can give the acts or conversations of those who were so, in evidence.

The Attorney-General.—They would be at least evidence to show how this witness became a member of the society, but I shall contend that they are admissible on general principles against these defendants, as proving the conspiracy.

Ballantine would contend that they were not evidence for any purpose. This was not a conspiracy but a felony, and here arose the fallacy of the *Attorney-General's* position. If these defendants were indicted for a larceny, could it be contended that conversations had, long before the offence was committed, with persons alleged to be implicated in the transaction, would be admissible against them?

Parry, on the same side.—It was clear that the defendants were not, on the 20th of July, parties to the conspiracy. It did not appear that they were at that time even acquainted with the persons whose acts were sought to be adduced in evidence against them, and there was nothing to show that what took place at that meeting was ever afterwards communicated to the prisoners. Under these circumstances he should contend, that even if the charge were one of conspiracy, it would not be admissible—far less ground was there for saying it could be admitted on a charge of felony. Evidence.

The Attorney-General argued, that although this was an indictment for a felony, it was a felony based upon a conspiracy. It was a compassing with others to do certain acts: that was the offence, and that was in its very nature a conspiracy. The overt acts did not of themselves constitute the offence, they were only evidence of the compassing; that was the crime, and that was a conspiracy. He would take the case put by the other side, and would contend that if several persons conspired to commit a larceny, a man who came in at the eleventh hour and joined in the commission of the offence, would be responsible for what they had previously done, for he would have adopted it by his subsequent conduct.

PLATT, B.—The rule in misdemeanors arises from the fact of all being principals, but that is not so in felonies.

WILLIAMS, J.—The reason why, in a conspiracy, you admit evidence of the acts and observations of others is, that those others are agents, but how is it the act of an agent when the party is not at the time involved in the conspiracy?

The Attorney-General.—The rule of law is precisely the same as to evidence, whether the charge be felony or misdemeanor. The

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crime is different, but there is no difference as to the proof. In felony all are principals for the purposes of proof, and you may give evidence of the acts of parties where there is a common design, though some of them have stopped short of committing the very acts charged. This is a conspiracy—a felonious conspiracy—and the rules relating to conspiracy must govern this case. If it can be proved that the defendants were parties to it, the ordinary rule is applicable to the acts and declarations of other conspirators, whether they occurred before or after the time when the defendants joined it.

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Welsby and Bodkin (on the same side).—The substantive charge in the indictment is that of compassing and intending, &c. The overt acts laid are the assembling and meeting. The charge is an act of the mind to be evidenced by the overt acts alleged; and this being so, precisely the same rules are applicable as in cases of conspiracy and treason where the principle and nature of the charge are precisely the same. Now in *R. v. L. Grey* (9 St. Tr. 127), it is laid down "That every person concerned in any of the criminal parts of the transaction alleged as a conspiracy, may be found guilty though there be no evidence that such persons joined in concerting the plan, or that they ever met the others; and though it is probable they never did, and though some of them only join in the latter parts of the transaction, and probably did not know of the matter until some of the prior parts of the transaction were complete." That rule is adopted in *R. v. Murphy* (8 C. & P. 297). In *Macklin's case* (2 Russ. 699), and in *Lee's case* (2 Macnally's Evidence, 634). So in *R. v. Hammond & Webb* (2 Espinasse, 718, and cited in 2 Russell on Crimes, 700), the indictment charged the defendants, who were journeymen shoemakers, with a conspiracy to raise their wages, and evidence was offered on the part of the prosecution of a plan for a combination among the journeymen shoemakers, formed and printed several years before, regulating their meetings, subscriptions, and other matters, for their mutual government in forwarding their designs. This evidence was objected to; but L. C. J. Kenyon said that if a general conspiracy existed general evidence might be given of its nature and the conduct of its members, so as to implicate men who stood charged with acting upon the terms of it, years after those terms had been established, and who might reside at a great distance from the place where the general plan was carried on. So in *Reg. v. Frost* (9 C. & P. 129), where a party met which was joined by the prisoner the next day, it was held that directions given by one of the party on the day of their meeting as to where they were to go and for what purpose, were admissible, and the case was said to fall within *R. v. Hunt* (3 B. & Ald. 566), where evidence of drilling at a different place two days before, and hissing an obnoxious person, was held receivable. The first thing to be proved is the conspiracy, then the defendants must be connected with it, and when this is done the acts and declarations of any other co-conspirators, made at whatever time, are admissible.

PLATT, B.—Your argument is, that the charge being an act of the kind established in the indictment by certain overt acts, one of those acts is a conspiratorial act, and must lead to the same evidence that applies to a conspiracy.

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Ballantine.—The Attorney-General had treated the case as though a compassing was precisely the same as a conspiracy; but it was very different. There must be two persons at least in a conspiracy. Under this act one might be tried for a compassing. One of the overt acts charged was no doubt a conspiracy; but the basis of the offence was an act of felony; it might be an act committed by one individual or by several at the same time; but if committed by several at different times one only could be charged as principal, and the rest would be accessories either before or after the fact. Suppose that at any meeting, these prisoners, being present compassed, to levy war against the Queen, the offence could be complete, and the Attorney-General would be estopped from given evidence of compassing upon any subsequent occasion, upon the principle that no two separate and distinct felonies can be included in one indictment; this shows how necessary it is to bear in mind that the basis of this charge is a felony and not a conspiracy, and that evidence other than such as is applicable to cases of felony cannot be given against these defendants. If they have proved to have met and compassed on the 1st of August, anything done subsequently would be evidence to explain that act; it is what was done by others on the 20th of July could have no bearing on the question of whether felony was committed twelve days afterwards. If what took place on the 20th of July was brought to the knowledge of the defendants afterwards, and they assented to it, then there might be little ground for the objection; but it is strongly contended that merely joining the conspiracy at a subsequent time is no presumption that all previous matters were communicated to them; but that it is incumbent on the prosecution affirmatively to show that such communication was made and the terms adopted.

PLATT, B.—Suppose that on the 20th of July the chairman of that meeting had given the witness a copy of the rules of the society—a society which the prisoners were proved afterwards to have joined, would not those rules be evidence against them?

Ballantine submitted that they would not without some proof that the rules had come to the knowledge of the prisoners.

Parry argued on the same side.—An overt act might explain the intention of persons charged, but the overt acts of others occurring before the prisoners knew anything of the conspiracy, acts which, they had known, they might have dissented from, could form no objection-matter for the jury to deliberate upon. Slight evidence of option might have rendered the evidence admissible, but here there was none at all.

The Attorney-General quoted the case of *R. v. Frost*, 9 C. & P. 9. There this point was virtually decided: a witness was called

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to prove he was with a party at a Chartist lodge on the 2nd of November, when a person named Reed gave them directions to go to Newport on the following night. The witness did not see the prisoner until he was on his march to Newport on the 4th. Serjt. Ludlow, for the crown, proposed to ask the witness what Reed said as to the purpose for which they were to go to Newport. Sir F. Pollock and Kelly, for the prisoners, contended that directions given in the absence of the prisoners could not be evidence against them. Reed was not upon his trial, and what he said on this occasion was said before the prisoners had joined the scheme, but C. J. Tindal received the evidence. He said, "I think it admissible: the effect of it is quite another thing." Mr. J. Williams, too, observed that, "although the question was not without difficulty, he thought the evidence ought to be received in accordance with what had been done in previous cases." In *R. v. Hunt*, 3 B. & Ald. 566, which came before the Queen's Bench on the question, how far Mr. Hunt could be affected by the conduct of other parties two days before the meeting at Manchester (Mr. Hunt having made his first appearance at that meeting), it was held, that evidence of drilling at a different place two days before, and hissing an obnoxious person, was receivable.

Parry.—No doubt Frost was proved to have been a party to the conspiracy long before.

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PLATT, B.—The report does not say so, and the argument seems to assume the contrary.

Ballantine.—In that very case Mr. B. Parke says, "One course in cases of conspiracy is to prove the acts of other parties to the conspiracy, and thus prove the conspiracy, and then that the party charged adopted those acts." That is the course assumed to be taken, but one main point is left out, namely, that there is not a tittle of evidence to prove the adoption.

PLATT, B.—But is not the question of adoption for the jury?

Ballantine.—No doubt it is if any evidence is given from which adoption may be inferred, but here there is none. Besides, that case was one of treason; this is a case of felony; and as has been before observed, the rules that govern evidence in conspiracy and treason totally differ from those applicable to felony.

PLATT, B.—It appears to the court that the examination may be proceeded with, upon the ground that it is competent to the parties who intend to prove a conspiracy to exist, either as a primary charge or a secondary one, to go into general evidence of the nature of the combination between the persons who may be assembled together, although the particular defendant were not of the number originally congregated. It falls precisely within the doctrine laid down in *Frost's case*, and although the word "adopted" is used, it is a question for the jury hereafter to say whether that which took place at this meeting was subsequently adopted by the several prisoners. In an indictment for conspiracy it is difficult to prove the defendant's privity without first proving the conspiracy, and the defendants may, therefore, go into general evidence of it.

If it may be done in those cases, it seems to me that, *à fortiori*, it may be done in this.

WILLIAMS, J.—One principle usually governs cases of conspiracy. After the conspiracy, of which the defendant is a member, is shown to exist, the acts of co-conspirators, done in his absence, are to be taken as his acts, because they are the acts of his agents. I think the evidence is admissible, because it is charged that the prisoners joined a certain confederacy, and that is charged as one of the overt acts by which only their intention is declared, and therefore it is part of the offence charged; that being so, it is competent to the crown to give a general history of the nature of the confederacy, provided, *primâ facie*, it is shown that it was joined by the prisoners. It must be a general history of the origin and progress of that confederacy.

Ballantine requested their lordships to reserve the point.

WILLIAMS, J.—*Hunt's case* is extremely strong against you, and we think we ought not to comply with your request.

It was then proved that on the evening of the 16th of August, the time which had been fixed for the general outbreak, a large number of armed men were found assembled in a public-house in Webber-street. None of the men had been previously connected by the evidence with the conspiracy, neither did it appear that the house had even been recognized as a place of meeting.

Ballantine, Parnell, Parry, and Metcalfe, objected that proof of what was done at that house could not be adduced. The people there were entirely isolated from these transactions. Not one of them was brought in contact either with the prisoners or with any person proved to have been a party to the conspiracy. The object of their meeting was entirely unknown. It might be that they were assembled for the purpose of getting up some distinct conspiracy of their own. It might be that they were burglars preparing to commit a midnight robbery in some adjoining street, and it would be very unjust to make the prisoners responsible for conduct which they had never sanctioned, and of which they were probably ignorant. For aught that appeared, the meetings were as distinct in their character as if they had taken place in different quarters of the world.

PLATT, B.—It seems to us that this evidence ought not to be objected to, because, upon the testimony of Powell, which we must take now to be evidence in the case, it seems that upon this night there was to be a considerable collection of armed persons, and we have at one of the meetings returns made by the delegates that the number of Chartist fighting men was as many as 5,000. It is not to be expected that a prosecutor is to prove the secret communication between several parties, all organized, in this private manner, to meet armed in different parts of the metropolis. The value of the evidence is a different matter. It does not certainly affect the prisoners directly, but it is for the jury to say whether it touches them indirectly by establishing the identity of motive of this meeting and the rest.

The prisoners were all found guilty.

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CENTRAL CRIMINAL COURT.

OCTOBER SESSION.

October 26, 27, 28, 1848.

REG. v. MULLINS. (a)

Refreshing memory—Accomplices—Spies, confirmation of—Witnesses to character after verdict.

A person was in the habit from time to time, and within two hours of their occurrence, of reporting to a police inspector proceedings that had taken place at certain meetings where a treasonable conspiracy was carried on. The inspector took down the purport of the report from his dictation, but not in the very words he used. When finished, some of the reports were read over by the witness, and some were read to him, and all were signed by him.

Held, that on examination he might use those reports for the purpose of refreshing his memory.

A person employed by Government to mix with conspirators, and pretend to aid their designs for the purpose of betraying them, does not require corroboration as an accomplice.

In general, witnesses to character cannot be examined after verdict and before sentence, where the defendant might have examined them upon the trial.

THE indictment was nearly the same as that in the preceding case. Davis, one of the witnesses for the prosecution, proved that he attended the meetings of the Chartist for the purpose of obtaining information, and then communicating it to the Government: that within two hours after each meeting he detailed such information to Marks, a police inspector, who wrote it down from the witness's dictation. Some of the accounts so written were read over to him—some he read himself. When Marks read them over, the witness sat by him. He often saw what Marks wrote, but did not see all. He signed all the papers.

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Marks deposed that he took down the purport of what Davis said to him from time to time, and framed it as a report. He did not take down the very words, but gave them as nearly as possible, with the exception that he began "I beg to report." To the best of his knowledge he read the whole of them over to Davis, who sat close by while he was writing, and had an opportunity of seeing what was written. Believed that Davis read many of them over, but could not say which.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

The Attorney-General proposed to put these papers into Davis's hands, that by them he might refresh his memory.

MAULE, J.—Some of the papers were read over by the man himself; others were not; we cannot distinguish between them. Therefore, unless you persuade us that both are admissible, you cannot use either.

The Attorney-General would contend that both were admissible.

Parry (with him *Metcalf*), for the prisoner, objected to the evidence. It was conceded that if the witness had seen another person write the papers, he might himself be able to vouch for their correctness as if he had written them himself, but no case had gone the length of saying that, where a communication was not taken down verbatim, the reading it over to the person who had made it would make it available for the purpose of refreshing his memory. The rule was laid down in *Russell on Crimes*, p. 922. It would be exceedingly dangerous to allow what might be an amended version of what was said to be used under such circumstances. The inspector admits that he took down merely the purport of the statement, and considering with what object this was done, nothing is more likely than that it would be an exaggerated report?

MAULE, J.—Suppose that, when it is read over to him, the language is quite different, still, if he understands it and adopts it, may it not be used?

Parry submitted that it could not. The jury were entitled to hear all that the memory of the witness could furnish, but that memory was not to be refreshed by the production of another man. What was intended by Davis's evidence was, to show the design of the prisoner by what was said by him at certain meetings. The omission or the substitution of a single word might make all the difference in the meaning of a sentence; a word might have been substituted by the inspector, which, to his apprehension and that of the witness when the paper was read over to him, would bear the same meaning as the original one, but which might bear in fact a very different and, perhaps, a criminal one. The witness might fairly have adopted that expression, and when used to-day may very unfairly prejudice the prisoner at the bar.

Metcalf.—There are here three chances of error occurring. The policeman may misunderstand what the witness states—he may take it down incorrectly, and he may incorrectly read it over.

WIGHTMAN, J.—Is not this, after all, analogous to the case of a deposition before a magistrate? The words are there taken down by an officer of the court, read over to the witness, and signed by him. May he not be permitted to refresh his memory with that deposition?

Metcalf knew of no case where that had been done. Of course it might be contradicted by his deposition, but there was no instance of its being used to support him. But even if that could be done it would be on a very different principle. The deposition taken, under the sanction of an act of Parliament, by a magis-

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trate who is presumed to perform his duty: but it is no part of a policeman's duty to take depositions, and there is no presumption that if he has done it he has done it properly. There is a case (*Laves v. Reed*, 2 Lewin, 152), where Mr. B. Alderson allowed a witness to refresh his memory from the notes of counsel, and another (*Balme v. Hutton*, 2 Russ. on Crimes, 922, n. (b),) where the same thing was permitted to be done from the notes of the judge.

WIGHTMAN, J.—I think witnesses have been permitted to refresh their memory from depositions: from depositions in bankruptcy, for instance.

Metcalfe.—Even assuming that to be so, there is still there the sanction of a court of justice. Here, if the witness had given the policeman his notes, and the latter had made up his report from them, such report would not be evidence, though the policeman swore that he had copied correctly. Here the details are given verbally, and the policeman takes them down; there is no further guarantee than there would be from a copy—less, in fact, because there the copy would be sworn to be a correct transcript; here it is admitted that the language varies from that used by Davis.

MAULE, J.—It appears to me that the witness may use these papers for the purpose of refreshing his memory, and on this principle a witness may look at a memorandum which was made at a time when the transaction was fresh in his memory, and the correctness of which he had therefore ample means of testing. If he can say that when his mind was so full of the circumstances, he ascertained that the paper correctly detailed them, it seems to me immaterial whether he so ascertained it by looking at the paper himself or by hearing it read over correctly by another person. What has been said about the many chances there are against this paper being authentic—the possibility of the policeman having misunderstood the witness—or mis-stated the subject-matter—or incorrectly read it over afterwards—this, no doubt, is an observation which goes to the weight to be given to the testimony of the witnesses, but it is no argument against the reception of the evidence.

WIGHTMAN, J.—I am of the same opinion. Taking the strongest case against the admissibility of the evidence, namely, the papers which the witness himself did not read, but which were read over to him by the inspector, the latter says he took down as accurately as he could what Davis told him; he read over to Davis precisely what he had taken down, and Davis says, that what was so read was an accurate account of what he had before detailed. Surely this is the same in principle as if Davis himself had written the papers, and now sought to refresh his memory from them.

The principal witnesses for the prosecution were, Powell, Davis, Barrett, and Baldwinson. The two former admitted that they joined the conspirators for the sole purpose of betraying them, and that each did so without the knowledge of the other. It was clear with reference to both, that they had been as active as any of the conspirators, endeavouring to persuade strangers to join them, and

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arguing those who were members to deeds of violence. Barrett had joined the conspiracy with the real intention of carrying it out, and it was not until the arrest of several parties, that he changed his course, and came forward to give evidence of their designs. Baldwinson was also a real conspirator at first, but he repented before the arrests took place, and gave information to the authorities.

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Parry, in addressing the jury, put it as a matter of law that the jury were not to put faith in the evidence of the above witnesses, because they were not in the least degree corroborated with regard to the only point in issue. He could not deny that a conspiracy existed; it had been proved by witnesses whom it would be folly in him to attempt to impeach; but the question was, whether the prisoner was a party to it: that point was untouched by the evidence of any other persons, except those above mentioned; they were accomplices to all intents and purposes, and, as such, could not by their unconfirmed testimony convict the prisoner. It was not sufficient that one part of their testimony was proved to be true by the corroboration of others; unless that part which was all important in this inquiry, namely, the fact of the prisoner's participation in the conspiracy, were also confirmed. He quoted *R. v. Farler* (8 C. & P. 106), in which Lord Abinger said: "It is a practice which deserves all the reverence of law that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history without identifying the persons, that is really no corroboration at all. If a man were to break open a house, and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put the knife to the throat, and did steal the property, it would not at all tend to show that the party accused participated in it. The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others." So, in *R. v. Wilkes* (7 C. & P. 272), Mr. Baron Alderson says, "The confirmation of the accomplice, as to the commission of the felony, is really no confirmation at all, because it would be a confirmation as much if the accusation were against you or me, as it would be as to those prisoners who are now upon their trial. The confirmation which I always advise juries to require is a confirmation of some fact which goes to fix the guilt upon the particular person charged." Those cases precisely apply here. The proof of the conspiracy is ample. In that these witnesses are confirmed, but how are they confirmed in anything that "goes to fix the guilt upon the particular person charged?" The fact of there being several accomplices here is quite immaterial. If there were fifty,

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it would be the same thing, for one tainted witness cannot set up the credit of another equally unworthy. For this position there is the authority of *R. v. Noakes* (5 C. & P. 326.) In that case Littledale, J. says, in the presence of Baron Bolland and Alderson, J.: "Then, was the prisoner there? Two of his accomplices speak distinctly to him. If these statements were the only evidence against him, I should not advise you to convict upon their testimony. It is not usual to convict upon the evidence of one accomplice without confirmation, and in my opinion it makes no difference that there are more than one." It would probably be said here that there was a certain amount of corroboration in the fact that Powell and Davis had both spoken to the same facts without any previous concert the one with the other, but that there had been no concert between them only rested on their own testimony, so that it did not carry the question any further.

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General for the
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The Attorney-General (in his reply) contended that it was a mistake to suppose that there was any rule of law requiring that accomplices should be confirmed. The judge would, as a matter of discretion, advise juries as to what may or may not be looked upon as evidence requiring corroboration, but could there be any stronger confirmation than this, that these men, not to-day, for the first time, but from day to day, as the transactions occurred, detailed the very same matters to the police, not in the same words, but the same in substance? All this, too, was done at the time when there could be no motive on the part of either Davis or Powell to conspire falsely to put Mullins' name to a transaction that was admitted to have occurred. He contended that this was confirmation, if any was required, but that in truth none was requisite; for, admitting the authority of the cases cited, these men were far from being accomplices in the sense in which the term was there used.

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MAULE, J. (in summing up).—There appears to be two classes of witnesses here who give most important testimony against the prisoners, and upon whom very strong observations have been made. They have been alluded to together under the term accomplices, but it is clear that there is a great distinction between them. As to Powell and Davis, they were persons who, understanding as they say, that there were dangerous designs entertained by certain Chartist societies, joined the meetings, and pretended to sympathize with the views of the conspirators, in order that they might communicate their designs to Government. They joined the scheme for the purpose of defeating it, and may be called spies. Barrett, and Baldwinson, on the other hand, were really Chartists, concurring fully in the criminal designs of the rest for a certain time, until getting alarmed, or from some other cause, they turned upon their former associates, and gave information against them. These persons may be truly called accomplices. Now as to spies, I know of no rule of law which declares that their evidence requires confirmation, nor any rule of practice which says that juries ought not to believe them. Even as to accom-

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although their evidence is entirely for the jury to judge of, I am bound to say that they are not such persons as it is the practice to say require corroboration.

The prisoner having been found guilty,

Parry requested their lordships to hear witnesses as to his character.

MAULE, J.—I do not wish to introduce a practice on the present occasion which might be a very inconvenient one in general. You are excluding the prosecution from contesting an important question of fact raised in the case, if persons acquainted with the prisoner are called as witnesses now.

Parry submitted that a verdict of guilty having been returned, the prosecution had no further object in resisting the fullest investigation into the prisoner's former character.

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character after
verdict.

The Attorney-General said that he was reluctant to oppose the application, but the great evil of acceding to these irregularities was, that they were drawn into precedents.

Parry said he was only taking a course that had been frequently pursued.

WIGHTMAN, J.—Not after trial, where the witnesses might have been called before.

The Attorney-General said it was of course done where a prisoner pleaded guilty, but never after trial, as far as he was aware; but he would offer no further opposition than the court thought he was bound to do.

MAULE, J.—I do not recollect any case in which this has been done, and though the propriety of the course I am pursuing is by no means clear, still, as the *Attorney-General* does not object, I will hear the witnesses.

CROWN CASE RESERVED.

June 23, 1849.

REG. v. CATHERINE HILL. (a)

Felonious receipt of stolen goods—Evidence of the receiving.

In an indictment for receiving stolen goods, it was proved that the stolen goods were forwarded by coach to a particular coach office, without any direction upon them, but with instructions that a person could call for them; and that the prisoner did call and inquire for them. They were shown to her, and she claimed them as the goods for which she came. She was then immediately taken into custody. It was held, that the evidence was insufficient to warrant a conviction; as, although she claimed the goods, they never were delivered into her possession.

At the Warwickshire Quarter Sessions held on the 12th of March, 1849, the following case was reserved:—
The prisoners were indicted, William Hill and James Hill, for stealing twenty fowls, the property of John Smith, and Catherine Hill for receiving ten fowls so stolen, &c., knowing, &c.
It was proved in evidence that the prosecutor is a farmer residing at Marton, in the county of Warwick, and possessed at the time of the robbery of a quantity of fowls, principally of the Dorking breed, white, with five toes in either claw. The fowls, to the number of twenty, were stolen from the prosecutor's premises between the evening of the 26th and the morning of 27th February.
On the 28th of February between seven and eight o'clock in the morning, the prisoner James Hill, accompanied by the other prisoner William Hill, brought in a wheelbarrow, to an inn at Additich, a box and a hamper, and delivered them to go by the coach to Birmingham. There was no direction affixed to either of them, but the prisoner James Hill, on delivering them said, "a person would call for them at Birmingham." The box and hamper were sent to Birmingham the following day, 1st of March, and shortly after the arrival of the coach in Birmingham the prisoner Catherine Hill came to the coach office and inquired after the box. The box was shown to her by the coachman, and she claimed it as the box which she was come for. Upon this she was taken into custody, and the box being opened in her presence was found to contain ten fowls, the fowls were plucked of their feathers, and from the claws of eight of them a fifth toe had been cut away, which was remaining upon the other two fowls. The prisoner, Catherine Hill, in answer to the observation of the police constable, that

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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these fowls were believed to be the property of the prosecutor, Mr. Smith of Marton, said "they had been sent to her from Stourbridge." The same day the house of the prisoner, William Hill, which is near to Redditch, ten or twelve miles from Birmingham, was searched by two police constables, who found a large quantity of feathers, chiefly white, which appeared to have been recently plucked, and also the entrails of fowls concealed about the house and premises; and the two male prisoners, who were at home in the house were apprehended. The prisoner William Hill, upon being told by the constables, on their first arrival, that they were come about Mr. Smith's fowls, said "he had not had a fowl on his premises for a fortnight." The prisoner William Hill is the husband of the prisoner Catherine Hill, and father of the prisoner James Hill.

The prisoners were undefended by counsel.

The jury found a verdict of guilty against all the prisoners; but the chairman entertaining some doubt, before the case went to the jury, whether this indictment could be sustained against the female prisoner as a receiver of goods stolen by her husband, respited the sentence upon her until the next Midsummer Quarter Sessions, in order that in the meantime the opinion of the court above might be obtained, whether upon the evidence the conviction of Catherine Hill be right or wrong.

This case was set down for argument on the 30th of April; but no counsel were instructed; and the following learned judges considered the question: Wilde, C. J., Alderson, B., Wightman, J., Rolfe, B., Cresswell, J., and Platt, B.

Cur. adv. vult.

Judgment.

WILDE, C. J., now delivered the judgment of the court; and after stating the substance of the facts found by the case, proceeded thus:—The question is, whether Catherine Hill was legally convicted of having received the fowls, knowing them to have been stolen. The case has been considered, and we are of opinion the conviction is wrong; for according to the evidence the prisoner has never in fact received the fowls, and never had power over them; she never had possession of the fowls at the coach office; the persons who had the custody of them there never parted with them; and she was immediately taken into custody. The prisoner claiming to receive the fowls, of which she never actually had the possession, did not, in point of law or fact, receive the fowls, and the conviction was wrong. Another question reserved was, how far the fact of the fowls having been sent to the prisoner by her husband could be urged as a legal excuse on the charge of having received them. That question it has been unnecessary to consider, as the prisoner never did in fact receive the fowls at all.

Conviction reversed.

COURT OF QUEEN'S BENCH.

*Guildhall, Dec. 12, 1849.**Sittings after Michaelmas Term.*

(Before LORD DENMAN, C. J.)

REG. v. WORLEY. (a)

Indictment for perjury.

On an indictment for perjury alleged to have been committed in an answer to a certain interrogatory exhibited in a suit in the Ecclesiastical Court, it appeared that a suit for divorce, on the ground of adultery, had been instituted against the prosecutor by his wife; that the defendant was a witness examined on behalf of the wife to prove her case; that cross-interrogatories were exhibited to him by the prosecutor by way of cross-examination, one of which, put for the purpose of impeaching his character, was the following: "Have you not passed by the name of Abbott, and also of Johnson?" His answer was, "I have never passed by the assumed name of Abbott or Johnson." It was clearly proved that he had.

Held, that the question and answer were not sufficiently material to the issue to warrant the case going to the jury.

THE defendant was charged with perjury in the following indictment.

The jurors for our Sovereign Lady the Queen upon their oath First count. present, that heretofore, to wit, on the 27th day of June, A. D. 1846, and at the time of the commission of the offences hereinafter mentioned, there was depending in the Arches Court of Canterbury a certain cause of divorce or separation from bed, board and mutual cohabitation, promoted by Ellinor, otherwise called Ellen Kelly, wife of John Kelly, against the said John Kelly; and the jurors aforesaid, on their oath aforesaid, do further present, that Isaac Worley, late of the parish of St. Benedict, near Paul's Wharf, in London, and within the jurisdiction of the Central Criminal Court, labourer, was produced as a witness in the said cause on behalf of the said Ellen Kelly, and having been duly sworn and examined on the part and behalf of the said Ellinor, otherwise Ellen Kelly, in the said cause, certain special interrogatories in writing were duly exhibited on behalf of the said John Kelly to the said Isaac Worley in the said cause; and the jurors aforesaid, on their oath aforesaid, do further present, that it became

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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and was a material question in the said cause whether the said Isaac Worley had ever passed by the assumed name of Abbott; and the jurors aforesaid, on their oath aforesaid, do further present, that the said Isaac Worley came before Alfred Waddilove, doctor of laws, then and still being surrogate of the Arches Court of Canterbury, in due manner constituted and appointed, on the 27th day of June, A. D. 1846, at the parish of St. Benedict, near Paul's Wharf, in London, and within the jurisdiction of the Central Criminal Court, and did then and there, to wit, on the day and year last aforesaid, in the parish of St. Benedict, near Paul's Wharf, in London, aforesaid and within the jurisdiction of the Central Criminal Court, take his corporal oath upon the Holy Gospel of God, before the said Alfred Waddilove, surrogate aforesaid, the said Alfred Waddilove then and there having full power and authority to administer an oath to the said Isaac Worley in that behalf, that he would at the time of his examination speak the truth, the whole truth, and nothing but the truth, indifferently between the parties in the said cause; and the jurors aforesaid, upon their oath aforesaid, do further present, that it was then and there in and by the third interrogatory so exhibited to the said Isaac Worley on behalf of the said John Kelly, set forth in manner and form and to the effect following, that is to say, Have you (meaning the said Isaac Worley) not passed by the name of Abbott and also of Johnson? And the jurors aforesaid, on their oath aforesaid, do further present, that the said Isaac Worley, being so sworn as aforesaid, afterwards, to wit, on the 27th day of June, A. D. 1846, in the year aforesaid, at the parish of St. Gregory in London aforesaid, and within the jurisdiction of the Central Criminal Court, was duly examined in the said cause in due form of law, and according to the course and custom of the said Arches Court of Canterbury, upon the said interrogatories so exhibited to him by the said John Kelly as aforesaid, and that he the said Isaac Worley not having the fear of God before his eyes, nor regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to pervert the due course of law and justice, did, on the said 27th day of June, in the year last aforesaid, at the parish last aforesaid, in London aforesaid, and within the jurisdiction of the Central Criminal Court, on his oath aforesaid, on his examination so duly made as aforesaid, falsely, corruptly, knowingly, wilfully and maliciously depose and swear in writing in answer to the said third interrogatory so exhibited to him as aforesaid, amongst other things, as follows, that is to say, I (meaning the said Isaac Worley) never passed by either the assumed names of Abbott or Johnson. Whereas, in truth and in fact, the said Isaac Worley had, at the time he so swore as aforesaid, passed by the assumed name of Abbott, to wit, on the 30th day of November, A. D. 1837, and on divers other days and times between that day and the day when he the said Isaac Worley so swore as aforesaid; and whereas, in truth and in fact, the said Isaac Worley well knew at the time he

swore as aforesaid that he had passed by the assumed name of **Abbott**. And so the jurors aforesaid, upon their oath aforesaid, do that the said Isaac Worley, on the 27th day of June aforesaid, the parish last aforesaid, in London aforesaid, and within the jurisdiction of the Central Criminal Court, by his own act and intent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, against the peace of our lady the Queen, her crown and dignity.

Second Count.—And the jurors aforesaid, on their oath aforesaid, further present that, after the commencement of the cause of divorce or separation in the first count mentioned, and whilst the said cause was so pending as aforesaid, to wit, on the 27th day of June, A.D. 1846, certain special interrogatories in writing were lawfully exhibited, in the course of the said cause, to the said Isaac Worley, on behalf of the said John Kelly. And the jurors aforesaid, on their oath aforesaid, do further present, that it then and there became and was a material question in the said cause, whether the said Isaac Worley had ever passed by the assumed name of **Abbott**. And the jurors aforesaid, on their oath aforesaid, do further present, that the said Isaac Worley, on the 27th day of June, A.D. 1846, at the parish of St. Benedict, near Paul's Wharf, in London aforesaid, and within the jurisdiction of the Central Criminal Court, came before Alfred Waddilove, Doctor of laws, then and still being surrogate as aforesaid, and did then and there, to wit, on the day and year last aforesaid, in the parish last aforesaid, in London aforesaid, and within the jurisdiction of the Central Criminal Court, take his solemn oath upon the Holy Gospel of God, before the said Alfred Waddilove, the said Alfred Waddilove then and there having full power and authority to administer an oath to the said Isaac Worley on that behalf, that he the said Isaac Worley would speak the truth, the whole truth, and nothing but the truth, indifferently between the parties in the said cause. And the jurors aforesaid, on their oath aforesaid, do further present, that it was then and there, in and by the third interrogatory so exhibited to the said Isaac Worley, on behalf of the said John Kelly as aforesaid, set forth in manner and form and to the effect following, that is to wit, Have you (meaning the said Isaac Worley) not passed by the name of **Abbott**, and also of **Johnson**? And the jurors aforesaid, on their oath aforesaid, do further present that the said Isaac Worley, being so sworn as aforesaid, not having the fear of God before his eyes, nor regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to pervert the due course of law and justice, did, on the day and year last aforesaid, at the parish last aforesaid, in London aforesaid, and within the jurisdiction of the Central Criminal Court, falsely, corruptly, knowingly, wilfully and mali-

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ciously, before the said Alfred Waddilove, surrogate as aforesaid, he the said Alfred Waddilove then and there having full power and authority to administer an oath as in this count aforesaid, depose and swear in writing in answer to the third interrogatory so exhibited to him as in this count aforesaid, among other things, as follows, that is to say, I (meaning the said Isaac Worley) never passed by either of the assumed names of Abbott or Johnson. Whereas, in truth and in fact, at the time the said Isaac Worley so swore as in this count aforesaid, the said Isaac Worley had passed by the assumed name of Abbott, to wit, on the 30th day of November, A.D. 1837, and on divers other days and times between that day and the day when the said Isaac Worley so swore as in this count aforesaid; and whereas, in truth and in fact, the said Isaac Worley well knew at the time he so swore as in this count aforesaid, that he had passed by the assumed name of Abbott. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Isaac Worley, on the 27th day of June aforesaid, in the parish last aforesaid, in the county aforesaid, and within the jurisdiction of the Central Criminal Court, before the said Alfred Waddilove (he the said Alfred Waddilove then and there having such power and authority as in this count aforesaid), by his own act and consent, and of his own most wicked and corrupt mind, in manner and form in this count aforesaid mentioned, falsely, wickedly and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Third count.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that after the commencement of the said cause of divorce and separation as in the said first count mentioned, and whilst the said cause was so pending as therein also mentioned, to wit, on the 27th day of June, A.D. 1846, certain special interrogatories in writing were duly exhibited in the said cause on behalf of the said John Kelly, to the said Isaac Worley. And the jurors aforesaid, upon their oath aforesaid, do further present, that it then and there became and was a material question in the said cause, whether the said Isaac Worley had ever passed by the assumed name of Abbott. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Isaac Worley, on the 27th day of June, in the year aforesaid, at the parish of St. Benedict, near Paul's Wharf aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, came before Alfred Waddilove, doctor of laws, then and still being surrogate as aforesaid, and did then and there, to wit, on the day and year last aforesaid, at the parish last aforesaid, in London aforesaid, and within the jurisdiction of the Central Criminal Court, take his corporal oath upon the Holy Gospel of God, before the said Alfred Waddilove, then and there having full and competent power and authority to administer an oath to the said Isaac

Worley in that behalf, that he the said Isaac Worley would, at the time of his examination, speak the truth, the whole truth, and nothing but the truth, indifferently between the parties in the said cause. And the jurors aforesaid, upon their oath aforesaid, do further present, that it was then and there by the third interrogatory so exhibited to the said Isaac Worley, as in this count aforesaid, set forth in manner and form and to the effect following, that is to say, Have you (meaning the said Isaac Worley) not passed by the assumed name of Abbott, and also of Johnson? And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Isaac Worley, being so sworn as in this count aforesaid, to wit, on the day and year last aforesaid, at the parish of St. Gregory aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, was in due form of law, and according to the course and custom of the said Arches Court of Canterbury, examined upon the said interrogatories so exhibited as aforesaid, before Robert George Longden, then and there being an examiner of the said Arches Court of Canterbury, and as such examiner then and there having competent power and authority to take the said examination of the said Isaac Worley in that behalf, and that the said Isaac Worley being so sworn as aforesaid, then and there not having the fear of God before his eyes, nor regarding the laws of this realm, but being moved and seduced by the instigation of the devil, then and there before the said George Robert Longden, then and there having such full and competent power and authority as in this count aforesaid, falsely, knowingly, wilfully, maliciously and corruptly did depose and swear in writing, in answer to the said third interrogatory so exhibited as in this count aforesaid, among other things, in substance and to the effect following, that is to say, I (meaning the said Isaac Worley) never passed by either of the assumed names of Abbott or Johnson. Whereas, in truth and in fact, at the time the said Isaac Worley so swore as in this count aforesaid, the said Isaac Worley had passed by the assumed name of Abbott, to wit, on the 30th day of November, A. D. 1837, and on divers other days and times between that day and the day when he the said Isaac Worley so swore as in this count aforesaid; and whereas, in truth and in fact, the said Isaac Worley well knew at the time he so swore as last aforesaid, that he the said Isaac Worley had passed by the assumed name of Abbott. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Isaac Worley, on the day and year last aforesaid, at the parish last aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, before the said George Robert Longden (he the said George Robert Longden then and there having such competent power and authority as in this count aforesaid) by his own act and consent, and of his own most wicked and corrupt mind, in manner and form in this count aforesaid, falsely, wickedly, wilfully, knowingly and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the evil and pernicious

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Fourth count.

example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Fourth Count.—And the jurors aforesaid, on their oath aforesaid, do further present, that after the commencement of the cause of divorce or separation in the first count mentioned, and whilst the said cause was so pending as aforesaid, it became and was a material question in the said cause, whether the said Isaac Worley had ever passed by the assumed name of Abbott. And the jurors aforesaid, on their oath aforesaid, do further present, that the said Isaac Worley, on the day and year last aforesaid, in the parish of St. Benedict, near Paul's wharf, in London aforesaid, and within the jurisdiction of the Central Criminal Court, came before Alfred Waddilove, doctor of laws, then and still being surrogate as aforesaid, in due manner constituted and appointed, and did then and there, before the said Alfred Waddilove, he then and there having full power and authority to administer an oath to the said Isaac Worley as aforesaid, take his corporal oath upon the Holy Gospel of God, that he would, at the time of his examination, speak the truth, the whole truth, and nothing but the truth, indifferently between the parties in the cause aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Isaac Worley, being so sworn as aforesaid, and duly examined touching the matters at issue between the said parties in the said cause, not having the fear of God before his eyes, nor regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to prevent the due course of law and justice, did, on the day and year last aforesaid, at the parish last aforesaid, in London aforesaid, and within the jurisdiction of the Central Criminal Court, on his examination so duly made as in this count aforesaid, falsely, knowingly, wilfully and maliciously depose and swear, amongst other things, as follows, that is to say, I (meaning the said Isaac Worley) never passed by either the assumed names of Abbott or Johnson. Whereas in truth and in fact, the said Isaac Worley had passed by the assumed name of Abbott, to wit, on the 30th day of November, 1837, and on divers other days and times between that day and the day when he the said Isaac Worley so swore as aforesaid; and whereas, in truth and in fact, the said Isaac Worley well knew at the time he so swore as aforesaid, that he had passed by the assumed name of Abbott. And so the jurors aforesaid, on their oath aforesaid, do say that the said Isaac Worley, on the 27th day of June aforesaid, at the parish last aforesaid, in London aforesaid, and within the jurisdiction of the Central Criminal Court, by his own act and consent, and of his own most wicked and corrupt mind, in manner and form in this count aforesaid, falsely, knowingly, wilfully and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

The indictment was removed by *certiorari* into the Court of Queen's Bench.

At the trial it was proved that a suit for divorce, on the ground of adultery, in which the wife of the prosecutor was the promoter against her husband, had been commenced and carried on in the Ecclesiastical Court. That the defendant was a witness on the part of the wife, and that certain interrogatories on behalf of the husband, by way of cross-examination, were exhibited to him. That one of the questions put to him with the view of impeaching his credit was the following: "Have you not passed by the name of Abbott, and also of Johnson?" His answer was as follows: "I have only passed by one assumed name and that was Wilson; and only then on the ground of my being in difficulties. *I never passed by the assumed name of Abbott or Johnson.*"

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It was clearly proved that he had for several years gone by the name of Abbott; that he lived with a woman who took that name; that two of his children by her were christened in that name, he being present and giving the name of Abbott to the registrar that it might be inserted in the register as that of the child's father.

Wilkins, Serjt., for the defendant, at the close of the case, submitted that there was no evidence of materiality to go the jury. It was quite immaterial to the issue in the Ecclesiastical Court whether the defendant had gone by the name of Abbott or not. The question there was whether there had been adultery on the part of the prosecutor towards his wife so as to entitle her to a divorce. How could the fact of the defendant having taken the name of Abbott affect that question? It would not even go to his credit, for *non constat* that the name may not have been assumed for a perfectly legitimate object.

Argument for
defendant.

Ryland, and *B. C. Robinson*, for the prosecution, contended that there was quite sufficient evidence of materiality for the jury. The defendant was a material witness for the promoters of the suit in the Ecclesiastical Court. It became important to ascertain what amount of credit he was entitled to, and questions as to his character were put to him. The fact of a man's going by various names was of itself, if unexplained, a strong circumstance against him, and might well induce a judge to pause before he received testimony of one so situated. The issue in that suit was, whether the prosecutor had committed adultery, and if the defendant had answered truly to the interrogatory put to him, it might have been followed up by inquiries which would have resulted in showing that he himself had been for years guilty of what he was seeking to prove against another. Not only, therefore, was there the fact of his having gone by another name, but the circumstances under which it was assumed would in that particular suit have had considerable influence in impeaching his testimony.

Argument for
the crown.

LORD DENMAN, C. J.—Surely the fact of his having committed adultery himself could have no tendency to induce him falsely to charge another with the same criminality.

Robinson.—Anything which tends in the slightest degree to

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impeach the testimony of a witness is material to the issue in which that testimony is given. In *R. v. Overton* (2 M. C. C. 263), it was held that a question having no general bearing on the matters in issue may be made material by its relation to the witness's credit, and false swearing thereon will be perjury. So, in 2 Salk. 519, it is laid down that, "If a man gives evidence to the credit of a witness, though this be not the issue, it is perjury;" (*Griepe's case*, Ld. Raym. 258; 12 Mod. R. 145.) It is not necessary that the materiality should be such that the issue of the cause must depend upon the particular answer. In Roscoe's Ev. 819, it is said, "The degree of materiality is not, it seems, to be measured. Thus, it need not appear that the evidence was sufficient for the party to recover upon, for evidence may be very material and yet not full enough to prove directly the issue in question:" and *Rhode's case* (2 Ld. Raym. 887), is referred to. In *Griepe's case*, *supra*, C. J. Holt says, "It is not necessary to appear in an information for perjury to what extent the evidence is material."

Judgment.

LORD DENMAN, C. J.—I do not think that the evidence of materiality is sufficient. I do not mean to say that a false answer, given under such circumstances as those proved, might not support a charge of perjury, but I am of opinion that in this case enough has not been shown on the part of the prosecution to connect the false answer with the issue on which the evidence was given. It might have been material, but we cannot clearly see that it was so.

DURHAM SUMMER ASSIZES.

(Before Mr. JUSTICE PATTESON.)

REG. v. COCKBURN. (a)

Rape—Assault—Consent of a child under ten years of age.

ough a child under ten years of age cannot legally consent to a rape upon her, yet she may consent to the attempt to commit it; and such an attempt, with her consent, would not be an assault. Where, therefore, a child is too young to know the nature of an oath, her evidence as to a rape upon her cannot be taken, and marks of violence on her private parts cannot be presumed to have been done against her consent.

THE prisoner was charged with having, at the parish of Tarrow, feloniously and carnally known Jane Pattrey, a girl under age of ten years.

It appeared that the child was under five years of age, and knowing nothing of the nature of an oath, could not be examined. Evidence was given by a surgeon of the private parts of the child having been penetrated and injured, but by what he could not say. A foreign substance, or a finger, might have done it. The charge of rape could not therefore be sustained; nor was there evidence that what had been done to the child had been done against her consent.

The counsel for the prosecution suggested that the prisoner might be convicted of an assault, as the indictment included an assault, and the consent of the child could not be presumed by reason of its tender age.

PATTESON, J.—No; that is a mistake of the law. My experience has shown me that children of very tender age may have various propensities. A child under ten years of age cannot give consent to any criminal intercourse, so as to deprive that intercourse of criminality, but she can give such consent as to render an attempt no assault. We know that a child can consent to that which, without such consent, would constitute an assault.

The prisoner was directed to be acquitted.

Verend, for the prosecution.

Addell, for the defence.

(a) Reported by T. CAMPBELL FOSTER, Esq., Barrister-at-Law.

NORTHERN CIRCUIT.

Summer Assizes, 1849.

REG. v. DRURY AND OTHERS. (a)

*Plea of autrefois convict.**Erroneous judgment no bar to subsequent indictment for the same offence.*

THE prisoners were indicted for having as members of a trade union at Sheffield incited others to destroy certain grinding machinery at Sheffield.

The case came on for trial at the Spring Assizes for 1848, before Mr. Baron Rolfe, and the prisoners were found guilty and sentenced to be transported for ten years, which judgment not being warranted by the statute under which the prisoners were tried (7 & 8 Geo. 4, c. 30, ss. 4, 26, which statute only authorizes transportation for seven years); a writ of error was sued out on the erroneous judgment, and the Court of Queen's Bench, after argument, gave judgment for the prisoners. The prisoners were again indicted at the Spring Assizes for 1849, for inciting others to destroy some other machinery; and their counsel then pleaded *autrefois convict*. To that plea the counsel for the crown demurred, and the demurrer was argued before Mr. Justice Coleridge, who then sat on the crown side at York, and his lordship postponed his judgment on the demurrer.

Judgment.

Mr. Justice WIGHTMAN now read the judgment of Mr. Justice COLERIDGE, which was as follows:—This case came on before me at the last Yorkshire Assizes upon a demurrer by the crown to the plea of the prisoners. Some points for the prisoners were made on the argument for which there appeared to me no foundation. I reserved my judgment on that which I now proceed to discuss. It was an indictment for felony by statute. The plea in substance stated a previous indictment for the same offence. Trial on a plea of not guilty, verdict for the crown, with judgment of transportation, a writ of error in the Queen's Bench, with various causes assigned, and judgment against the crown that the prisoners be restored to all things lost by the judgment and depart hence without delay in that behalf. There was an averment that the judgment was reversed for errors above assigned in the giving of the judgment in the court below. Upon the argument it was insisted for the prisoners that the reversal must be taken to have proceeded solely on the error especially assigned in the judgment itself, that it was for a longer period of time than the statute

(a) Reported by T. CAMPBELL FOSTER, Esq., Barrister-at-Law.

assigned or permitted. Assuming this, it appeared that there had been a good indictment, issue well joined, a trial completely had, and a lawful verdict found. And although it was admitted that no judgment could now pass for the crown, yet it was said the proceedings were a bar to any other indictment, equally whether the legal effect of the whole was a conviction, or, as might be contended, a lawful acquittal, for that the principle which barred a second prosecution was simply that a man should not twice be put in jeopardy for one and the same offence. Although many causes of error were assigned, I think the case must be decided upon this assumption, for it would be too much to assume on the other hand that any other cause was well assigned; none other was pointed out in the argument or insisted on, which showed that the indictment itself was insufficient. It cannot, therefore, be denied that the prisoners were at one time, and in some sense, in jeopardy on the same charge as that which is now preferred by this indictment. The question, therefore, seems to be, in what sense is to be understood that which is laid down as the true principle on which the plea of *autrefois convict* stands. Lord Hale (2 H. P. C. ch. 32, p. 251) says, "If A. be indicted and convicted of felony, but hath neither judgment of death, nor hath prayed his clergy, this is no bar of a new indictment for the same offence, if the first were insufficient; and, it seems, though it were sufficient, yet it is no bar without clergy or judgment. But if he had his clergy allowed him, *autrefois convict* and *had his clergy* is a good bar to an indictment or an appeal for the same crime, and so remains at this day, notwithstanding 3 Hen. 7, c. 1." Lord Hale, therefore, thought, though he expresses the opinion here with some hesitation, that a conviction on a good indictment was no bar, unless judgment or clergy followed as the fruit of the conviction. The only authorities which he cites for the whole passage are *Vaux's case* and *Wigg's case* (4 Rep. 45, a & b.) *Vaux's case* was on an insufficient indictment, and the material resolution proceeds on the principle that in such case the prisoner has never been in jeopardy. Neither is *Wigg's case*, or anything resolved in it, any authority for the opinion which Lord Hale throws out, and which is now in question. But Lord Hale goes on to say, "and so it is, though he prays his clergy and the court will advise upon it, though the clergy be not actually allowed;" for this he cites *Holcroft's case*, which is cited at length in *Wigg's case*, and the principle is the satisfactory one, that as conviction and clergy granted would have barred the act of the court in delaying to grant the prayer while advising upon the propriety of allowing it, it shall not prejudice the prisoners. But then this presupposes that clergy was ordinarily necessary in the absence of judgment to make the conviction operate as a bar; and it supposes also the conviction to have been on a good indictment; for if the indictment was bad, it is clear that the grant of clergy united to the conviction would not have made the conviction any more a bar than it was before. It is clear that, in respect of the plea of *autrefois acquit*, there must not only

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Judgment.

be the verdict but judgment also to make it of avail (2 Hale's P. C. 243); and Lord Hale applies the same rule in terms to the plea now in question (*ib.* 248). Lord Hale's judgment, therefore, on the whole will appear to be clear against the present plea. Hawkins (*bk.* c. 36), states the principle on which the plea rests as does Lord Hale; but the conclusion to be drawn from the whole chapter is, that without judgment, allowance of clergy, or at least prayer of clergy by the prisoners (the delay of granting being only the act of the court), the conviction was no bar to a second indictment. This rule is rather assumed through the chapter than laid down in terms, but it is to my mind satisfactorily made out. Mr. Starkie, whose excellent book on criminal pleading may now be quoted as direct authority, lays down the same rule very precisely, thus: "After conviction the defendant remains without receiving judgment or praying his clergy, or he prays his clergy without receiving judgment, or he receives judgment of death, whereby he becomes attainted. If the defendant after conviction remain either without receiving judgment or praying his clergy, he may be indicted for any other offence or even for the same" (vol. ii. 311.) Against these authorities I cannot find anything to be set, nor can anything be relied on but a literal construction of the rule, which cannot be maintained. A man who has been tried, convicted, and attainted on an insufficient indictment, or on a record erroneous in any other part, is in so much jeopardy literally that punishment may be lawfully inflicted on him, unless the attainder be reversed in a court of error; and yet when that is done he may certainly be indicted again for the same offence, and the rule would be held to apply that he had never been in jeopardy under the former indictment. The true meaning, therefore, of "not having been in jeopardy" in this rule seems to be, that by reason of some defect in the record, either in the indictment, place of trial, process, or the like, the prisoners were not lawfully liable to suffer judgment for the offence charged on that proceeding, and, so understood, it is true in the present instance. The judgment reversed is the same as no judgment; upon a record without any judgment no punishment can be suffered. That is the present state of this record and so it must remain; for it has been repeatedly decided (see *R. v. Brown*, 7 Ad. & El. 58), that neither the Court of Queen's Bench nor the court below can now pronounce any judgment on it. The former never had the power; the latter is *functus officio*. Judgment must therefore be given against the plea; and certainly justice and common sense concur with authority in this conclusion. It would be shocking to both, that individuals who object only that they have been regularly found guilty of an offence on a lawful trial, but that there has been a mistake in the judgment pronounced, which judgment has on that ground been reversed and can never be carried into effect, should therefore remain exempt from all punishment. The plea has not concluded with pleading over to the felony, which is the usual and proper form. In strictness, therefore, the prisoners are left without defence, and the

judgment might be final, but upon the whole I think they should now be allowed to withdraw the plea and plead not guilty, which course may be better than to allow them to amend by adding the usual conclusion in bar, as that might lead to a second demurrer.

Bliss (with whom was *Pickering*), on the part of the prisoners, inquired if the judgment given was not that the prisoners answer over to the felony.

WIGHTMAN, J.—The judgment given is that the prisoners have leave to withdraw their plea and plead not guilty, or the judgment will be final.

After a short consultation with his clients, *Bliss* intimated that they submitted to the judgment.

The counsel for the crown considering the long imprisonment the prisoners had undergone, suggested that they should be discharged on entering into their recognizances.

His lordship gave judgment accordingly, and the prisoners having entered into the required sureties were discharged.

Counsel for the crown, *Wilkins*, Serjt., *Hall*, and *Overend*; for the prisoners, *Bliss* and *Pickering*.

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CENTRAL CRIMINAL COURT.

MARCH SESSION.

March 1, 1849.

(Before Mr. JUSTICE CRESSWELL.)

REG. v. COOPER. (a)

Accusation of an unnatural crime with intent to extort money—Evidence.

On the trial of an indictment for accusing a person of an unnatural crime with intent to extort money—the prisoner being a soldier, and the accusation having been made while he was on duty as sentry—evidence of declaration made by him on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard-house and accuse him of an unnatural crime, was held admissible.

The prisoner was proved to have made the accusation in these words, "I charge this man with indecently assaulting me."

Held, that it was a question for the jury—taking into consideration the prisoner's conduct throughout the transaction—whether by those words he did not mean to allege that the prosecutor had solicited him to the commission of an unnatural offence.

THE prisoner was indicted for feloniously accusing one H. C. S. of having assaulted him with intent to commit b——y, with

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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intent to extort money. There were other counts for accusing the said H. C. S. of having attempted and having solicited him to commit the said crime.

It appeared in evidence that on the night in question the prosecutor was taking shelter from the rain under one of the porticoes of Buckingham Palace, when he was accosted by the prisoner, who was the sentry on duty there. After some conversation the prisoner seized the prosecutor by the collar, and charged him with having indecently touched or assaulted him; he then took the prosecutor to the guard-house, and said to the serjeant, "I charge this man with indecently assaulting me." The prosecutor was then taken to the police station-house, where the prisoner made the same charge. On the charge being entered into the next morning before the magistrate, the prisoner stated, among other things, that the prosecutor caught hold of his private parts. A bill of indictment was presented at the next Middlesex Sessions against the prosecutor for indecently assaulting Samuel Cooper, but it was ignored by the grand jury, Cooper, the then prosecutor, not appearing. A similar indictment was presented at the subsequent session, when Cooper appeared, but the bill was thrown out.

In the course of the trial,

Argument as to
admissibility of
evidence.

Bodkin (with whom was *Richards*, for the prosecution), asked one of the witnesses for the prosecution whether he had ever, upon former occasions when the prisoner had come off guard, seen money in his possession.

Ballantine (for the prisoner), submitted that such a question could not be put. It had no relevancy to the present inquiry. On such a charge no evidence of other transactions could be adduced, because its only tendency could be to prejudice the minds of the jury—to ask them to judge from past conduct what was likely to have been done by the prisoner on this occasion. The prosecution could not be permitted to show that the prisoner had been some time before convicted of extortion, and this question had precisely the same bearing.

Bodkin contended that the question was quite regular. Where part of the issue to be tried was the knowledge or the intention of the accused at the time he did a particular act, matters having no immediate bearing on that act become material and relevant, if they in any way tended to explain his motives. Here the prisoner's conduct on other like occasions was very material in enabling the jury to determine with what object this particular proceeding was taken by him. The evidence was admissible in the same way that proof of other utterings was offered to show guilty knowledge, although they might be totally disconnected with the one under consideration.

CRESSWELL, J.—Are you not asking the jury to infer guilty knowledge from remote and independent facts? Suppose a man was charged with wounding with intent—the intention there is of the essence of the charge—could you prove that he had cut a man's head open the week before?

Bodkin submitted that he could, if both wounds were given with the same instrument.

CRESSWELL, J.—How would that show the intention otherwise than by showing knowledge?

Bodkin.—Just as the possession of other counterfeit coin may be proved in an indictment for uttering.

CRESSWELL, J.—There knowledge, and not intention, is the subject of the proof. But suppose the witness gives an affirmative answer to your question, what is your next step?

Bodkin.—I shall then ask what he said as to the means by which he obtained the money.

Ballantine said that he objected to any such question, on the grounds before urged.

CRESSWELL, J.—But if the prisoner is proved to have stated on other occasions that he had obtained money by the same means that are stated to have been used in this case, is it not a fair inference to make to the jury that his object was to obtain money here?

Ballantine.—To prove guilty knowledge is not to prove a guilty intention. Proof of a man's previous character would, in the ordinary affairs of life, have some bearing upon the question of whether he had committed a particular crime, but it is inadmissible in law.

CRESSWELL, J.—If a man administers a certain drug to another, and it produces death, and afterwards administers the same drug to another person, may not the former conduct be proved to show that he well knew the consequences of the subsequent act?

Ballantine.—Not where it is simply used as evidence to prove intention. The prisoner may have used threats on a previous occasion, and have obtained money by so doing, but that does not show that he had an intention to obtain money at this particular time. The offence here charged is a single and specific one. Suppose the charge was breaking into a house with intent to steal, the fact of his having broken into the house before, would show that he knew how the offence was to be accomplished, but it could not be adduced to show what his intention was on the second occasion, and this shows the difference between proof of knowledge and that of intention. The broad rule that two felonies cannot be proved on the trial of one indictment, is clearly recognized, and there is nothing in this instance to show that it should be departed from.

CRESSWELL, J.—I do not think that this is at all a question of character. The evidence is not offered by way of proving simply that the prisoner had been guilty of the same crime before. The question is, whether on this occasion he did an act with the design of effecting a certain object. One step in the proof is to show that he would be likely to know that a certain result would follow, and if it can be proved out of his own mouth that he was aware that such result would be produced, it is one ingredient in the necessary proof that he contemplated it. Suppose a charge against a man that he had attempted to procure abortion: the same medicine might be administered with that intention or without it. If it could

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be proved that he had often given that medicine before, and that he knew that abortion had always followed, surely that would be evidence against him. Or if, on a charge of wounding, a certain instrument had been used, and the same weapon had before been used by the prisoner with a dangerous result, would not that be admissible to show that he knew the consequences of using it? We do not yet know what the answer to the question to which you object may be; but suppose the prisoner had said the day before this transaction, "I think I could get money when on guard by seizing some man passing by, taking him to the guard-house, and making some charge against him;" and it was suggested to him, "but you must not ask for money;" and his answer was, "No; I won't do that, but I think a man under such circumstances will give it me;"—I could not reject such evidence. His whole conduct is to be interpreted with reference to the charge made against him, and I think what was said by him under similar circumstances to the present is admissible.

Evidence was then given of declarations by the prisoner on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard-house, and accuse him of an unnatural crime.

At the close of the case for the prosecution,

7 & 8 Geo. 4,
c. 29, s. 8.

Ballantine submitted that there was no evidence of the charge in the indictment to go to the jury. The 7 & 8 Geo. 4, c. 29, s. 8, enacted, that "if any person shall accuse any person of any crime punishable by law with death, transportation, or pillory, or with any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime, &c., with intent to extort money, &c., should be guilty of felony." The 9th section defined what should be an infamous crime, viz., "buggery, committed either with mankind or beast, and every assault with intent to commit that crime, and every attempt or endeavour to commit that crime, and every solicitation, persuasion, promise or threat, offered or made to any person, whereby to move or induce such person to commit or permit such crime." Taking the case as it stood, there was no evidence at all of any charge of the character above mentioned made by the prisoner. As to the indictment presented at the sessions, the prisoner could not be made answerable for its terms. It might have been drawn in its specific form without his cognizance. With regard to the charge at the police station, it was, that the prosecutor had indecently assaulted him, the prisoner. This meant nothing more than a common assault. It was in no other way a crime known to the law; certainly not any of those mentioned in the act of Parliament.

Bodkin observed that there was a count charging an accusation of soliciting, and the word "solicitation" was expressly mentioned in the statute.

Ballantine.—The question is, whether this is a charge of an infamous crime, that crime including a solicitation to commit the offence specifically mentioned in the act.

CRESSWELL, J.—The charge is, that the prisoner accused the

prosecutor of having solicited him to commit a certain crime. You say, that instead of having charged a soliciting, he charged a certain act to have been done. The real question is, is that a solicitation? By charging him with doing that act, did he mean to charge him with soliciting?

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Ballantine.—But the act proved is an assault, and the words “assault” and “solicitation” are both used in the act of Parliament. It is clear, therefore, that they were intended to be different things; the one an act done, the other a solicitation in its strict sense.

CRESSWELL, J.—Suppose the case of an assault with intent to commit a rape; that means an assault made with an intention to use force, and to commit the rape if possible; but it often happens that a very indecent assault is committed with no intention of resorting to further violence, if resistance is offered, but merely in the hope that the woman’s scruples may be overcome. Now, supposing that a man’s soliciting a woman to yield her person to him was an offence, might not such indecent assault, committed for such a purpose, be treated as a solicitation, in case the evidence fell short of proving an attempt to commit a rape? In short, may there not be a solicitation by deeds as well as by words?

Ballantine.—It is not contended that there may not be a solicitation by deeds, but that the mere laying on of hands cannot be called one. The charge at the police station says nothing about soliciting. It uses another word included in the act of Parliament, namely, an assault, but does not describe such an assault as is there defined.

CRESSWELL, J.—We have nothing to do with the charge at the police station or that made before the magistrate. He could not make any charge there to extort money. We must look to what the charge was in the very first instance.

Bodkin referred to *R. v. Hickman* (1 M. C. C. 34); and *R. v. Tucker* (1 M. C. C. 134.)

CRESSWELL, J.—I think, in this case, that although the prisoner charged the prosecutor, in terms, with an assault, throughout the transaction and afterwards, yet that it was with an assault of such a character and made under such circumstances, that it might be taken to mean a solicitation. It is a question which the jury must determine.

The question was so left to the jury, and the prisoner was convicted.

Bodkin and *Richards*, for the prosecution.

Ballantine, for the defence.

COURT OF CRIMINAL APPEAL.

April 30 and June 23, 1849.

(Before WILDE, C. J.; ALDERSON, B.; WIGHTMAN, J.;
CRESSWELL, J.; and PLATT, B.)

REG. v. ILLIDGE.(a)

Forgery—Warrant, order, or request for the delivery of goods.

On an indictment for forging an order for the delivery of goods, the instrument alleged to have been forged being an order on a dock company to permit the bearer to taste wines in the docks belonging to the alleged drawer :

Held, that the giving out at the docks a portion of the wine for the purpose of its being tasted there by the person presenting the order was a delivery of goods within the 1 Will. 4, c. 66, s. 10.

In the ordinary course of business at the docks, the tasting order being directed to the dock company and being signed by the merchant owning the wines, is taken to a clerk at the docks who writes his name across it, and this signature is an authority to the cooper, without which he is not justified in acting.

Held, that such an instrument was an order as soon as it left the hands of the merchant properly drawn up, and that the signature of the dock clerk was not essential to give it validity as an order.

AT the February Session of the Central Criminal Court, Mr. Justice CRESSWELL reserved the following case:—

The prisoner was tried before me at the Central Criminal Court in February last, on an indictment which charged him with feloniously uttering a forged warrant for delivery of goods, to wit, wine, well knowing the same to be forged, with intent to defraud the London Dock Company. Other counts described the instrument as an order and as a request. There were other counts in the indictment similar in form, but charging an intention to defraud Samuel Vincent and another.

It was proved that the prisoner, on the 9th of January, went to the London Dock and presented to a clerk in the service of the

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

company, in the Crescent Vault wine department, a document called a Tasting Order, of which the following is a copy :—

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1242. *To the Cooper* *Vault, London Docks,* 184
S. 32.

Permit Self and Company to taste wines
ex “Traveller,” Captain Austin, a Cadiz.

Entered by “William.” May, 1848.

| Mark. | No. |
|-------|-------------|
| D. A. | 112/ 114 |
| O. P. | |

Butts.

Tasted
Sampled

Casks N^o
Ditto

Vincent & Pugh.

Shewn by {

The course of business at the London Docks, with reference ^{Case.} to such orders, is, that the merchant who has wine in the vaults and wishes to enable a party to taste it, gives an order in the form set out. It is then taken to the clerk before mentioned, and he writes his name across it, and when it has been so signed by him, but not otherwise, the coopers of the company are authorized to act upon it, and allow the party presenting it to taste the wine described in it. The instrument in question was presented to the clerk for his signature, but he suspecting it was not genuine refused to sign it, and said he must first send to Vincent & Pugh. The prisoner said he would return in half-an-hour, and went away, but did not return. It was proved that the signature Vincent & Pugh was a forgery, and that the prisoner knew it to be so. For the prisoner it was objected that a tasting order could not be considered an order for the delivery of goods, and, secondly, that this never was a perfect order, nor was uttered as such, but was handed to the clerk for his signature, in order that it might become an available tasting order.

I thought it right to reserve these points for further consideration, and the jury having found the prisoner guilty, I ordered him to be discharged on his own recognizance to appear and receive judgment when called upon so to do.

Huddleston, for the prisoner, contended that this was not an order for the delivery of goods. It could not be said that the delivering wine for the purpose of its being tasted was a delivery of goods

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within the meaning of the statute. It must be such a delivery as would give the person receiving an absolute control over the property, but here the person using the order has no power or authority to do more than taste the wine.

PLATT, B.—But by such tasting of the wine he disposes of it effectually.

WILDE, C. J.—Is not this very like an order for the delivery of a sample?

Huddleston submitted that it was not. There the person taking the sample might take it away with him and do with it as he liked; here he could not do so—the wine was handed to him for a special purpose. Suppose a man forged an order to smell certain aromatic substances; the sensation of smell is caused by certain particles of the substance flying off and coming in contact with the nostrils: these he might carry away with him, but could the giving him an opportunity of smelling these substances be called a delivery of goods?

WILDE, C. J.—Suppose a man were to go to a cook-shop with a forged order for a good dinner; surely he would exercise an absolute control over the provisions that were furnished to him, and probably he would carry them away with him.

Huddleston contended that there the delivery would be more complete than it would be here. The wine would never be really out of the possession and control of the cooper until it was taken into the stomach of the taster. But it was not absolutely necessary that it should be drunk at all; what was technically termed “tasting” wine, was the forming a judgment upon it, and this was very often accomplished simply by the smell.

Huddleston for
the prisoner.

PLATT, B.—Surely it is a sufficient delivery if given for no other purpose than to be drunk, but it is a mere assumption on your part that the person presenting the order would not be allowed to carry a sample away.

Huddleston then submitted that the instrument was neither an order, warrant, nor request. It was clearly not the last named, for it purported to be given by some person having authority, and to be binding on the person to whom it was to be delivered: (*R. v. Williams*, 2 C. & K. 5.) But it could never be of any validity at all until countersigned by the clerk. *R. v. Richards* (R. & R. 193), and *R. v. Randall* (R. & R. 195), are authorities for the position that there cannot be a forgery of an imperfect instrument. There were cases in which instruments in the form of bills of exchange were held not to be orders for the payment of money for want of a payee; they could not be enforced: so here the order would be unavailable at the docks until the clerk had countersigned it.

PLATT, B.—But surely that is a mere private regulation of the dock company, and does not affect the validity of the instrument as an order.

WILDE, C. J.—The merchants have a right to make the order, but certain formalities must first be complied with.

Huddleston submitted that the same observation might be made with respect to the cases he had quoted.

ALDERSON, B.—In *R. v. Randall*, the instrument purports to be payable to some third person or order, but that person is not named, and therefore it was held not to be a bill of exchange at all. Here the instrument, on the face of it, does purport to be an order.

Huddleston.—But the case must be looked to, to see what would be requisite to its full operation, and then we find that it is no order unless signed by the clerk.

PLATT, B.—Suppose a banker gives his clerks directions not to honour cheques of a customer until they are countersigned by a particular cashier, would not an indictment for forgery lie against a person who forged a cheque, although the cashier's signature was not obtained?

Huddleston.—Not if the arrangement was acceded to by the customer, and he agreed that no cheque should have validity until countersigned by the cashier. So here the practice at the docks is known to the prosecutors, and their arrangement with the directors is, that they should have no authority to order, except according to that precise practice.

WILDE, C. J.—But how can you contend that the countersigning gives to the document any extra validity? The dock company are bound to obey the order of Messrs. Vincent & Pugh. As to the way in which it shall be obeyed they may exercise a discretion.

Huddleston.—The order purports to be upon the cooper, and it is clear, that according to the arrangement between the dock company and the merchants, the latter could not compel the cooper to act until they had first obtained the signature of the clerk. In *R. v. Rushworth* (R. & R. 317), the prisoner was indicted for forging a magistrate's order, and by the act of Parliament relating to the particular authority, it was necessary that the order of the magistrates should be under seal, but the alleged forgery was of an instrument under hand only, and it was held that no conviction could take place. Another point decided in that case was that the order being made upon a person whom the magistrate had no authority over, the conviction was wrong. There it was established that it is necessary to look at something beyond the instrument itself, to see whether the order is complete. Here Vincent & Pugh purport to be the orderers, the cooper to be the orderer. The former have no authority over the latter, until something is done which here has not been done. The assent of the company is requisite, and that does not appear to have been given. It is precisely the case of two persons having jointly but not separately the right to make an order, and it is made by one alone.

ALDERSON, B.—The difficulty is this, Vincent & Pugh may order the dock company, but they cannot order the cooper. The dock company say, if you do a thing in a particular way we will be responsible for its execution, but not otherwise.

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WILDE, C. J.—The merchants could not order the servant; he could only obey the order of the company. They may give him a limited authority to obey the merchant under particular circumstances, and they say to the merchant, "we give you authority to order our servant to act according to the ordinary course of business and according to that only;" then when the order leaves the hands of the prisoner, is it in such a state as would authorize the cooper to act upon it?

Huddleston.—The case says that it is not, for it has not the countersign of the clerk.

Ballantine (for the prosecution), submitted that the case supported all the counts in the indictment. It showed the instrument to be an *order* upon the dock company, a *warrant* to the dock company, and a *request* to the cooper. He was clearly not bound by the terms of the instrument itself; that was conceded; the question was, what was its operation in fact? The instrument was obligatory upon the dock company. They had their own forms, and made their own arrangements. The merchant had a right to give an order that his wine should be tasted, and if the company disobeyed the order when given, they would be liable to him for any damage he sustained thereby. The merchant might not be aware of what the internal arrangements at the docks were. He it is who has the sole authority over his own property, and he does all that he can do to make the exercise of that authority complete.

Ballantine for
the prosecution.

WILDE, C. J.—Suppose you were to draw a cheque upon the cashier of your banker instead of upon the banker himself, what authority would you have over the cashier?

Ballantine submitted that he would have authority, provided such a mode of drawing was practised at his bankers. If he drew a cheque he would have done all he could by way of making an order. How that order was to be obeyed, how many hands it must pass through before, in the ordinary course of business, the money was obtained, would be quite immaterial. The merchant was the only person having authority to order; he did order. Surely the countersignature of a servant of the orderee could not add any validity to the document to make it an order if it was not one before.

PLATT, B.—The signing of the clerk is the signing of the company: then, can it be said that the act of the company is required to complete an order upon themselves?

Ballantine then contended that the instrument was, at all events, a warrant. It would certainly justify the dock company in allowing the wines to be tasted.

WILDE, C. J.—Suppose a succession of such orders to be presented to the cooper without the countersignature of the clerk, and the wine to become thereby considerably diminished, could the merchant recover from the company?

Ballantine said, that whether he could or not, the merchant had nothing to do with the rules of the dock company; they might

make what alterations in their arrangements they pleased, without his consent.

WIGHTMAN, J.—Suppose, on the other hand, the merchant does not think proper to present the order to the clerk for his signature, but takes it at once to the cooper, who refuses to obey it, could the merchant recover as on the breach of an implied contract?

Ballantine would submit that he might. There was no direct contract between the merchant and the dock company.

CRESSWELL, J.—But unless there is an understanding that the order shall be given according to the regular course of business, then it is clear that the prosecutor will have no right to make an order upon the servant. You must import the practice into the case to sustain your own argument.

Ballantine would contend that whether or not the merchant might maintain an action in either of the instances lately put, was quite immaterial to the present inquiry. It might be that the merchant was bound to present his order to the proper persons, just as the customer of a bank must present his cheque to the persons appointed to pay it; but it would be a cheque as soon as it was drawn, precisely as this was a warrant the moment the merchant had done all he had authority to do to it.

PLATT, B.—Is not this very like the case of a warrant of attorney lodged at a banker's? It would doubtless be necessary that some forms should be gone through before it could be made actually available; but it would not be less a warrant of attorney at the time it was lodged.

Ballantine.—It was a mistake to suppose that this was an order or a warrant to the cooper. It was, in fact and in operation, an order to the dock company, although addressed to the cooper.

WILDE, C. J.—Still the cooper and the warehousemen have no means of knowing whether it is good or bad. Whatever regulations are made, are made for the protection of the dock company. If the merchant lost his wines the company would be liable, and, therefore, they have a right to make their regulations as stringent as possible.

Ballantine.—It was conceded that when countersigned by the clerk, it would be an order or warrant; but suppose that the clerk refused to sign it, then it would follow that he who had an exclusive right to deal with his own property, could not make a complete order respecting it. The clerk and the cooper were, in fact, the dock company. If the countersignature of the clerk made this an order when it was not one before, the dock company would be in truth making an order upon itself. At all events the instrument was a request to the dock company, or, what is the same thing, to the cooper. Even supposing the cooper was not bound to act, still it was a request to him to do so.

WILDE, C. J.—But suppose a compliance would have been contrary to the duty of the cooper, then it would not be a request within the statute, which only applies to lawful requests.

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v.
ILLIDGE.
—
Forgery—
Warrant or
order.
—

Ballantine for
the prosecution.

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v.
ILLIDGE.
—
Forgery—
Warrant or
order.
—

ALDERSON, B.—How can this be a request, which only applies where the party requesting has no right to order, but only hopes that what he asks will be complied with? If this is not an order because not completed, and not a warrant because the cooper would not be warranted in acting upon it, then it cannot be a request, because the merchant has power over his goods, but has not properly exercised it. If a man puts my name across a piece of paper, without more, would that be a forgery, because the paper might be afterwards filled up so as to represent a perfect bill?

Ballantine.—In that case no one could tell what was the man's object in merely writing the name. There would be no instrument there of any kind. It would purport to be nothing, and would be nothing in fact. But here the instrument was perfect as far as it went, and was perfect as far as the person having the sole right of making an order could make it so. It was directed to the dock company although in fact addressed to the cooper, just as a customer of the Bank of England drew his cheques upon the cashiers and not upon the directors. The dock company were the orderers, and nothing that they or their servants could do with the instrument could give it any further validity, either as a warrant or an order. It was precisely like the signature of a bank clerk being requisite upon a cheque, merely as a voucher to the cashier that the customer's account was not overdrawn.

As to the question whether, if this were an order, or warrant, or request, it was for *the delivery of goods*, THE COURT intimated to the learned counsel that they were satisfied as to that point.

Huddleston replied.—The instrument did not purport to be addressed to the dock company, neither was its effect to obtain the delivery of goods, because the cooper would not be justified in obeying it. There was a joint authority over the wine, and the order could not be complete without a joint act. The merchant might give an order either on the dock company themselves, or to their servant, but if he gave it to the latter, he must take care and give it according to the ordinary course of business.

Cur. adv. vult.

JUDGMENT.

Judgment.

On Saturday, June 23, WILDE, C. J., delivered the judgment of the court as follows:—Upon consideration, we are of opinion, that the conviction in this case was right. The first question is, whether the instrument which the prisoner uttered, knowing it to be forged, was an order. It was directed to the cooper, at a particular vault in the London Docks, and purported to be signed by the owner of wine in that vault, and was in this form:—“Permit self and company to taste wines, *ex* ‘Traveller,’” &c., which must mean, permit the party signing, and company, to taste; the order, therefore, to the cooper to permit the wines to be tasted was given by that party. It is true that the order was presented by the prisoner to a clerk of the company, in order that

he also might affix his name to it, and without his signature the cooper had no authority to obey the order, but it was not the less an order because the cooper had not authority to obey it. Again, assuming that the signatures of both the merchant and the clerk of the company were necessary to make a perfect and efficient order, it would be an order by each as soon as his signature was affixed. If a promissory note were made payable to A. and B., not in partnership, or their order, so that the signature of both would be requisite to make an efficient indorsement, a party forging the indorsement of A., and uttering the instrument to B. for the purpose of procuring his signature, would be guilty of uttering a forged indorsement: (*Winterbottom's case*, Denison's Crown Cases, 41.) Upon the same principle, we think that the prisoner, in this case, was guilty of uttering a forged order. The next question is, whether it can be considered as an order for the delivery of goods: now, although it is true, that the quantity delivered for the purpose of tasting is very small, yet it is impossible to say that it is not an order for the delivery of some wine, and as we cannot apply the principle of "*de minimis non curat lex*" to such a transaction, we feel bound to say that it was an order for the delivery of goods, and that the verdict of guilty was right.

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ILLIDGE.
—
Forgery—
Warrant or
order.
—

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

June 2, 1849.

(Before LORD DENMAN, C. J.; PARKE, B.; PATTESON, J.;
COLTMAN, J.; and WILLIAMS, J.)

REG. v. COOPER. (a)

Exposure of an infant child with intent to burden a parish.

An indictment for leaving and deserting an infant child in a certain parish, with intent to injure and aggrieve the inhabitants of the said parish, is not sufficient, there being no allegation that the child was settled elsewhere, nor that the child received any damage or was likely to do so.

THE following case was reserved at the May Session of the Central Criminal Court by Mr. Commissioner Bullock.

The prisoner was found guilty at the May Sessions of the Central Criminal Court, upon the second count of an indictment, which charged that she, "being an evil disposed person, and ^{Case.} contriving to injure and aggrieve the inhabitants of the parish of Barking, and unjustly to burthen the said parish with the charge and maintenance of a certain female child of very tender age, to wit, of the age of one month, whose name to the jurors

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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child.*
—

aforesaid is unknown, which she, the said Eliza Cooper, had in her care and custody, afterwards, to wit, on the same day, &c., with force and arms, at, &c., unlawfully and injuriously did take, carry, and convey the said female child, which she so had in her care and custody, into the parish of Barking, in the county of Essex, and within the jurisdiction of the said court, and then and there, in a certain open and public place and Queen's common highway, then called Barley-lane, to wit, about the hour of eight of the clock in the morning of the same day, unlawfully did leave and desert the said child upon the ground of and in the said lane, contrary to her duty in that behalf, the said child being of such tender age as aforesaid, and unable to take care of herself.

The first count of the indictment alleged the child to be the prisoner's own child, but there was no evidence to support that allegation, nor any evidence to show how the child came under the prisoner's care and custody.

The judge respited the sentence, and reserved the case for the opinion of the judges in the Court of Criminal Appeal whether the second count was sufficient.

LORD DENMAN, C. J.—The offence charged is, that the defendant left some child, born of her body, exposed in a certain parish. There is nothing stated with respect to any ill-usage it sustained, but merely that the parish was burthened with its keep.

PARKE, B.—The indictment does not allege that the child was settled elsewhere. I do not think it can be supported. As to the charge that due care was not taken of the child, it does not appear that it has sustained or is likely to sustain any damage from it.

Conviction quashed.

EXCHEQUER CHAMBER.

June 15, 1849.

KING v. THE QUEEN. (a)

*Perjury committed in an affidavit to hold to bail—Indictment—
Form of record—New trial.*

An affidavit to hold to bail may be sworn before the issuing of the writ in the action; and, therefore, an indictment for perjury committed in such an affidavit need not state that any action was pending.

On entering an award of a new trial upon the record of the proceedings upon an indictment for misdemeanor, it is unnecessary to state the reasons for which the new trial was granted; it is enough to say "because it appears to the court that the said verdict was unduly given, therefore the said verdict is by the said court here vacated and made void, and all other process ceasing against the jury before impanelled, the sheriff, &c., is commanded that he cause a jury anew thereupon to come, &c."

Upon an indictment for perjury containing two counts, the entry of the final judgment was, "It is considered, &c., by the court here, that he the said K., for the offence charged upon him, in and by each and every count of the indictment aforesaid, be imprisoned, &c."

held sufficient.

In setting forth the indictment, the past tense was used: "it was presented" instead of "it is presented."

held immaterial.

ERROR from the Queen's Bench, upon a judgment for the crown upon an indictment for perjury. The record set out the indictment, stating that "it was presented by the jurors, &c." The first count in substance alleged that before the commission of the offence, a writ of summons in an action of debt between Oliver Waterloo King, (the plaintiff in error) plaintiff, and George Telthouse, defendant, had been sued out; that the said O. W. K. wickedly and maliciously contriving and intending unjustly to aggrieve the said G. T., and wrongfully and without just cause to induce Sir C. Cresswell, Knight, then being one, &c., to make a certain special order of him the said Sir C. C., to direct that G. T. should be held to bail, and thereupon wrongfully and injuriously to sue out and prosecute a writ of *capias* for the arrest of G. T., afterwards and before final judgment, to wit, on, &c.,

Indictment.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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Perjury.

at, &c., came before the said Sir C. C., and then and there produced a certain affidavit in writing of him the said O. W. K., and in due form of law was sworn, &c.

The second count charged in substance, that the said O. W. K. wilfully, &c., contriving and intending unjustly to aggrieve the said G. T., and to put him, the said G. T., to great expense; and also unjustly and maliciously to cause him to be arrested for 40*l.*, by virtue of a writ of *capias*, went before Sir C. C., and then and there produced an affidavit in writing, &c.

The Record.

The indictment had been preferred and found at the Central Criminal Court on the 4th of December, 1848, and was afterwards removed into the Court of Queen's Bench. The record of the proceedings in the Queen's Bench, after setting out the issue joined upon the plea of not guilty, and all the other proceedings down to the finding a verdict of guilty, proceeded thus:—"And hereupon the said Charles Francis Robinson, who prosecuteth for our Lady the Queen in this behalf, prayeth the judgment of the said court here, against the said O. W. K. upon the verdict aforesaid, so given against him as aforesaid; wherefore, all and singular the premises being seen and fully understood by the said court of our said Lady the Queen, now here, because it appears to the said court here, that the said verdict so given against the said O. W. K. as aforesaid, was unduly given; therefore, the said verdict is by the court here vacated and made void, and all other process ceasing against the jury before impanelled, the sheriff of the said county of Middlesex is commanded that he cause a jury anew thereupon to come before our said Lady the Queen, at Westminster, on Monday the 31st of January, in this same term, by whom the truth of this matter may be the better known," &c. The record then set out the proceedings down to the finding of a second verdict of guilty and prayer of judgment, and after stating a continuance for the giving of judgment, concluded:—"It is considered adjudged and ordered by the said court here that he, the said O. W. K., for the offence charged upon him in and by each and every count of the indictment aforesaid, be imprisoned in the Queen's prison for the space of eight calendar months now next ensuing." &c.

Points set down
for argument.

The points set down for argument on the part of the plaintiff in error, were, amongst others, that the award of the *venire de novo* was not warranted by any sufficient suggestion or statement upon the record; that neither count sufficiently showed an offence in law; that the judgment was uncertain, and may have been pronounced either in respect of one and the same offence supposed by the court to have been charged in the different counts of the indictment, or have proceeded on two different offences charged in the respective counts of the indictment, one at least of which counts was bad in law, and that the judgment was also bad, inasmuch as it assumes that the two offences charged are one and the same offence.

June 13. (a)

KING
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THE QUEEN.
Perjury.

Pashley for the plaintiff in error.—First, as to the indictment, the second count is bad. It omits the statement contained in the first count that a writ of summons had been sued out when the affidavit was sworn. [MAULE, J.—That statement is quite unnecessary; for the affidavit may be sworn before the writ issues. PARKE, B.—Yes; the practice was settled soon after the passing of the act abolishing imprisonment for debt. WILLIAMS, J.—The question was settled in *Schletter v. Cohen*, 7 Mee. & W. 389.] Then, secondly, as to the form of the record, the statement of the award of a *venire de novo* is informal. The reason ought to appear for awarding a *venire de novo*, though not for granting a new trial. (He referred to *Gee v. Swann*, 9 Mee. & W. 685; *Mounson v. West*, 1 Leon. 132; *Gould v. Oliver*, 2 M. & G. 238, n. (b); *Conway and Lynch v. The Queen*, 7 Ir. L. Rep. 149.) [PARKE, B.—That was a case of felony in which the jury had been discharged without giving a verdict, and in which there was no discretionary power to grant a new trial. In this case there is no doubt that the court had the power. It was exercised in the cases of *Rex v. Mawbey* (6 T. R. 626), and *Rex v. Robins* there cited, as well as in the recent case of *Gray v. The Queen*, 11 C. & F. 427.] A new trial is not granted after an acquittal even in those cases, in which the discretionary power exists; and for that reason also the grounds ought to be stated on the record. (He referred to *Reg. v. Gompertz*, 9 Q. B. R. 824; *King v. Simmonds*, 1 H. L. Cas. 764; *R. v. Creevy*, 1 M. & S. 273; *Reg. v. Gamble*, 16 M. & W. 384.) Thirdly, the record is in the past tense—"it was presented,"—instead of the present: (*Rex v. Perin*, 2 Wms. Saund. 393.) Fourthly, the judgment in the form in which it is entered is uncertain.

Pashley for the
plaintiff in error

PARKE, B.—It is not necessary at present to hear the other side, for we think that there is nothing in any of the objections; but the case may stand over in order that search may be made for the records in *Rex v. Mawbey* and *Rex v. Robins*, and that it may be ascertained how the granting of a new trial was entered in those cases.

June 14.

C. Clark, for the prosecution, stated that no record could be found either of *R. v. Mawbey* or of *R. v. Robins*, but that he had obtained a draft of the record in *Rex v. Smith* (E. & T. T. 1828), which stated the granting of a new trial in the following words:—"Whereupon all and singular the premises, being seen, &c., because it appears to the said court here, that the said verdict so given against the said William Smith and Henry Smith as

C. Clark for the
prosecution.

(a) Before Parke, B.; Alderson, B.; Coltman, J.; Maule, J.; Rolfe, B.; Cresswell, J.; and V. Williams, J.

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aforesaid, upon the said second, third and fourth counts of the said indictment, was unduly given, therefore, the said verdict, so far as respects the said W. Smith and H. Smith, is by the court here vacated and made void, and all other process ceasing against the jury before impanelled, the sheriff of the said county of Monmouth is commanded that he cause a jury anew thereupon to come," &c. In the margin of the draft, opposite this entry, there was a note, in the handwriting of Mr. Robinson, the Master of the Crown office, stating, "this is taken from the *King v. Robins*, before referred to," referring to a previous marginal note to an earlier part of the same record in these words:—"This is from the entry of the proceedings in *R. v. Robins*, referred to by Mr Justice Lawrence in his judgment given on the application for a new trial in *R. v. Mawbey* (6 T. R. 640), who there says that great consideration was given to the case of *R. v. Robins*." The margin also contained a query in Mr. Robinson's writing, whether the words "upon the said second, third and fourth counts of the said indictment," ought to be inserted. A draft record in the case of *R. v. Hodgson* (M. T. 1833) had been found containing the entry of a new trial in the same terms.

Cur. adv. vult.

June 15.

Judgment.

Pashley objected that the drafts were of no authority as precedents, citing *R. v. Smith* (8 B. & C. 341.)

ALDERSON, B.—They are sufficient to satisfy us what was the language of those records.

PARKE, B.—The question is settled by these precedents.

Judgment affirmed.

COURT OF CRIMINAL APPEAL.

(Before POLLOCK, C. B.; COLERIDGE, J.; ROLFE, B.;
CRESSWELL, J.; PLATT, B.)

November 7, 1849.

REG. v. HENRY HARRIS. (a)

Indictment against bankrupt for not discovering his estate—Repugnancy.

An indictment against a bankrupt after alleging that he had surrendered and submitted to be examined and was sworn, charged that at the time of his said examination the bankrupt was possessed of certain real estate, and that he feloniously did not discover when he had disposed of the same.

Id., that the indictment was bad in arrest of judgment.

Where, whether the indictment was also bad for not alleging that the prisoner was in fact examined as to his real estate.

THIS was an indictment against a bankrupt upon the 5 & 6 Vict. c. 122, s. 32, upon the trial of which the following case was reserved by Platt, B.:—

Henry Harris was convicted before me at the last Gloucester Case. I give you upon an indictment charging that he, upon his examination under a fiat in bankruptcy, issued against him, did not discover when he disposed of certain real property, of which had been possessed, with intent to defraud his creditors.

The fiat issued on the 11th of November, 1843. The prisoner at the time of his bankruptcy was possessed of an equity of redemption in land and houses which he had mortgaged, and also land and houses which were incumbered. In December, 1843, January, 1844, he executed a deed, dated the 14th of April, 1842, purporting to convey on that day all his interest in the above-mentioned property to his children, and on his examination, which began on the 3rd of January, 1844, and ended on the 1st March in the same year, stated he had disposed of his interest in the property on the day on which that deed bore date.

The indictment, after stating the trading, petitioning creditor's Indictment. act of bankruptcy, the fiat, and the adjudication of bankruptcy under it, proceeded thus:—"And the jurors aforesaid,

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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—
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—

upon their oath aforesaid, do further present that the said Henry Harris, late of the city and county of Bristol, shoemaker, dealer and chapman, afterwards, and within the time limited by law in that behalf, to wit, on the day and year last aforesaid, at the city and county of Bristol aforesaid, surrendered himself to the said district court, authorized to act in the prosecution of the said fiat, and was there, as last aforesaid, duly sworn before the said Richard Stevenson, he the said Richard Stevenson acting as such commissioner, having then and there lawful and competent authority to administer the said oath, and duly submitted himself to be examined before the said court. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Harris, at the time of his said examination, to wit, on the day and year last aforesaid, was possessed of a certain real estate, to wit, all that plot, piece or parcel of ground, hereditaments and premises, situate in the parish of Christchurch, in the said county of Monmouth, &c. (describing the real property), and that the prisoner at the time of his said examination, and being so sworn as aforesaid, then and there feloniously did not discover when he disposed of, assigned and transferred the said real estate of him the prisoner, being such bankrupt as aforesaid, the same not having been really and *bonâ fide* before then, and before the time last aforesaid, sold and disposed of, in the way of the trade of the said prisoner, or laid out in the ordinary expense of the family of the said prisoner, with intent then and there thereby to defraud the creditors of the said prisoner, against the form," &c.

Huddleston moved to quash the indictment, (a) and after the conviction, in arrest of judgment, contending that the indictment should have contained two distinct allegations:—First. That the prisoner was examined. Second. That the prisoner had in fact disposed of the real property; and, that the absence of either of these allegations rendered it substantially defective. At the close of the case for the prosecution, he also contended that the indictment was misconceived, for that the prisoner had, on his examination, stated a time at which he alleged that he had disposed of the property. I overruled the first and second objections, and as to the second objection held that, if the prisoner on his examination falsely, and with intent to defraud his creditors, swore that he had conveyed the property to his children on the 4th of April, 1842, he did not discover it within the meaning of the act. The case went to the jury and the prisoner was convicted on the merits. But I may have been mistaken in overruling the two objections raised by counsel, and the success of any of them would have defeated the prosecution. I have thought it more safe to reserve them for further discussion and submit them to the consideration of the judges.

Huddleston (with him *M^r Mahon*) for the prisoner.—First, it is no where stated that there ever was an examination. The words

(a) As the case was originally drawn it stated that *Huddleston* demurred to the indictment but the court doubting whether they could entertain questions raised on demurrer, it was afterwards amended by the learned judge as above.

the time of the said examination" refer to what has gone before, and the preceding statement is of a submission to examination—not of an examination. At the trial it was suggested that the word "said" might be rejected; but it is clear that cannot be done. The bankrupt laws make a distinction between the submission to examination and the examination. In *R. v. Page* (1 Brod. 3. 308), it was held that a bankrupt who has surrendered to commission is not guilty of felony within 5 Geo. 2, c. 30, s. 1, though he refuse to answer questions concerning his property; and that section contained the same words as that upon which the present question arises: "if any person who shall become bankrupt shall surrender himself to the commissioners named in the commission, &c., and submit to be examined from time to time upon oath, shall be deemed to be guilty of felony." The refusal to answer, or not fully answering, is provided for by other sections. The 5 & 6 Geo. 3, c. 122, s. 32, has the same words, "submit to be examined from time to time;" and on this indictment there is nothing to show what was the nature of the examination, or indeed that there was any examination at all. [POLLOCK, C. B.—Your argument is that the bankrupt may have been sworn and no question put to him. Is he bound to state every thing? Will he be guilty of felony merely by silence? Does it not mean an active examination?] Yes; a bankrupt is not bound to disclose all his property in his schedule as an insolvent is; and in practice, the examination administered is, "You shall true answer make to all such questions as the court shall demand of you." [COLERIDGE, J.—That is not in the statute.] An interval of thirty days is to elapse between the first and last examination; *non constat* that the defendant had passed his final examination, and until that time he has a *locus penitentie*, and cannot be indicted for concealing property which upon his last examination he may give up: (*R. v. Peters*, 5 Car. & P. 138.) If the word "said" was rejected, still it was the examination which he underwent? Was it as a witness only? Or, if as a bankrupt, was it the first, second, or third? It may have been that he went before the commissioner and was merely asked "are you the bankrupt?" That is often the case if the bankrupt is unopposed. Again, the statute says, "upon examination," the indictment "at the time of his said examination;" and the two statements are very different. "At the time" would include the whole period until the final examination; "on" refers to the particular occasion on which the offence was committed: (*R. v. Bartholomew*, 1 Car. & K. 366; *R. v. Stevens*, 1 Car. & C. 246.) Secondly, the indictment is clearly repugnant. There ought to have been a distinct allegation that the bankrupt disposed of the real property; but, instead of that, the allegation is, that at the time of the examination he was possessed of real estate; and that at the time of the examination he did not disclose when he had disposed of it—two inconsistent statements—which render the indictment bad in arrest of judgment: (Lawk. P. C. c. 25, s. 62; Com. Dig. Indictment G. 3; Stark.

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Huddleston, for
the prisoner.

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—

Cr. Pl. 234; 1 Hawk. P. C. c. 64, s. 39.) [CRESSWELL, J.—It is quite consistent with this indictment that when he came before the commissioners he may have been asked to answer a question incapable of an answer, viz., how he, being possessed of certain real estate, had disposed of it, he not having disposed of it at all.] The third point is, that if he was guilty of any offence, it was perjury.

W. H. Cooke, for the crown.—The indictment contains a sufficient statement of the offence, if it would convey to a properly educated mind information of the nature of the charge; and here it follows the language of the statute. This form of indictment has been adopted in all the cases: (*R. v. Page*, 3 Moore, 656; *R. & R. C. C.* 392, and 1 B. & B. 308; *R. v. Bullock*, 1 Taunt. 71; 2 Leach C. C. 996.) [POLLOCK, C. B.—In that case the defendant was charged with a substantive act of concealment which was found against him.] “Upon the said examination,” must mean the examination to which he had submitted, and it matters not how often the examination is adjourned, the whole is but one examination in point of law: (Pearson’s Chitt. on Pleading, 258; *R. v. Aylett*, 1 T. R. 36, 70.) [POLLOCK, C. B.—You substitute in the indictment “at the time of” for “upon.”] It is in effect the same thing; because the bankrupt submits to be examined *toties quoties*, however numerous the adjournments may be. After verdict, “at the time of his examination” must at all events import that there was an examination. The word “said,” if necessary, may be rejected: (Stark. Cr. Pl. 248.) [POLLOCK, C. B.—It is quite consistent with this indictment that the bankrupt may have appeared and been sworn, and then asked as to certain matters, but nothing as to his real estate; and he may have omitted to mention it only because the examination had not reached that point. But, “upon his examination,” means something different—not “at the time of the examination,” but upon questions being put relative to the particular matter.] Surely, what he was asked and what he swore is matter of evidence. If the necessary questions were not asked he would be acquitted. If the statute makes it a felony to conceal his estate the bankrupt must be bound to disclose it; at all events, the commissioner would violate his duty if he neglected to ask the proper questions. [POLLOCK, C. B.—We cannot presume that they were asked; and I doubt whether a bankrupt, by merely remaining silent, no questions being asked, could commit this offence. COLERIDGE, J.—The question really is, whether, during the course of examination, the bankrupt is not bound to discover all his estate,—whether it is not cast upon him, although no specific questions may be asked, to disclose what he knows; and I think it very questionable, whether, if he knows of property, he is not absolutely bound to discover it. The “examination” of a bankrupt is a word of art, and means the whole examination which he undergoes. Mr. Russell (*On Crimes*, vol. 2, p. 228, last edit.) cites from the book on Bankruptcy, by Lord Henley, who was

W. H. Cooke,
for the crown.

the author of stat. 6 Geo. 4, c. 16, a note stating that there was an inaccuracy in sect. 112, the words "in case of default or wilful omission" being omitted.] The argument for the prosecution certainly is, that the bankrupt is bound to disclose his estate, whatever may be the form of examination, and although no creditor attends to interrogate the bankrupt. "At the time of the examination" includes the whole period until the examination is complete: (*Wright's case*, 1 Ad. & Ell. 434; 3 Nev. & M. 892; *R. v. Somerton*, 7 B. & C. 465.) Secondly, as to the supposed repugnancy, if the pretended conveyance of his property by the bankrupt was illegal, he was still possessed, and therefore in that allegation there is nothing inconsistent with the other allegation that he did not discover how he had disposed of it. [CRESSWELL, J.—Suppose that he had never assigned the property at all, would he have been guilty of any offence described in this indictment?] No. [CRESSWELL, J.—Then there is no allegation that he ever did assign. On the contrary, the allegation that he was possessed raises the presumption, *prima facie*, that he had not assigned.] After verdict the allegation that he did not discover how he had disposed of it, involves an allegation that he had disposed of it.

COLERIDGE, J.—How can we make that intendment when Judgment. there is a positive allegation raising the opposite presumption?

POLLOCK, C. B.—It is impossible to get over that objection. We say nothing about the other.

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v.
HARRIS.
Bankrupt.

Judgment arrested.

COURT OF CRIMINAL APPEAL.

(Before POLLOCK, C. B.; PARKE, B.; PATTESON, J.;
WIGHTMAN, J.; and TALFOURD, J.)

November 20, 1849.

REG. v. WM. MARSH AND ANOTHER. (a)

Attempt to commit a misdemeanor.—Unlawfully obtaining money with intent to defraud.

An indictment which merely charges that the defendant did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully to obtain from A. B. a large sum of money with intent to cheat and defraud him, is bad in arrest of judgment.

THIS was a case reserved by WIGHTMAN, J., at York, in the following terms:—

Case.

The prisoners were indicted at the York Summer Assizes, 1849, before me, for attempting to defraud an insurance company, called the Agriculturalist Cattle Insurance Company. Upon the trial Lord was acquitted, and Marsh found guilty upon the fifth count of the indictment. That count was as follows:— And the jurors aforesaid, upon their oath aforesaid, do further present that the said William Marsh and James Hill Lord, on the said 28th day of October, in the year of our Lord 1848, with force and arms, at the said parish of Wadworth in the said county of York, did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully to obtain from the Agriculturalist Cattle Insurance Company a large sum of money, to wit, the sum of 22l. 10s., with intent thereby then and there to cheat and defraud the said Agriculturalist Cattle Insurance Company, against the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity. The fraud complained of was, the making a false claim in the name of Marsh upon the company, in respect of an alleged loss of a horse of Marsh's by disease, which had been insured by him with other stock by a policy with the company.

The policy was between three of the directors of the Agriculturalist Insurance Company of the one part, and William Marsh of the other part, and was against the loss of the animals insured by death arising from disease or accident, not fraudulently or

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

carelessly occasioned, except loss happening by glanders or castration, by stock stolen maliciously or feloniously trenched, maimed, slaughtered, poisoned, or injured, or destroyed by fire, or any invasion, foreign enemy, or civil or military commotion whatever.

Certain conditions were indorsed upon the policy, and amongst them the following:—"That the illness, accident, or death of an animal be not caused by any neglect or carelessness of the owner or those in his employ, or by ill-treatment, over-driving, wilful poisoning, racing, burning, glanders, or castration, and that no claims will be paid unless the carcase be seen by the inspector."

The policy had no stamp. And it was contended for the prisoners, that it could not be received in evidence without a stamp. The objection was overruled, and it was received on the ground that it was one of the instruments by which it was intended to commit the alleged fraud.

The false claim was signed by Marsh and attested by Lord. Proof was given of the handwriting, but it was contended for the prisoner Marsh, that the other prisoner, Lord, being the attesting witness, should be called as a witness for the prosecution. This objection, however, also, was overruled; the written claim was received upon proof of the handwriting of the prisoners, without calling Lord as a witness.

The registration of the company, under the 7 & 8 Vict. c. 110, by the title of "The Agriculturalist Cattle Insurance Company," dated 1st September, 1845, was put in and read. It appeared that the company had a deed of settlement, which was not produced.

It was contended for the prisoners, that the company could not be described as such, nor by their name of registration in an indictment. That their name could only be shown by the deed of settlement. That they only became a company under 7 & 8 Vict. c. 110, from the date of the certificate, and the certificate was not proved.

These objections, also, were overruled.

The prisoner Marsh being convicted on the fifth count, a motion was made in arrest of judgment, on the ground that the count did not show any offence in law.

The questions for the opinion of the court are,

1st. Whether the judgment on the fifth count ought to be arrested?

2nd. And if not, whether the objections taken at the trial, or any of them ought to have prevailed?

Bliss, for the prisoner.—The fifth count shows no offence. It states an attempt to commit a fraud, but it does not show that the fraud was a misdemeanor; and to make the attempt an indictable offence, it must clearly appear that it was a misdemeanor which the defendant attempted to commit.

PARKE, B.—That is, that he attempted to obtain the money by false pretences.

Bliss.—Yes; or that the cheat was of a public nature. A mere cheat is not indictable: (2 East P. C. 818; *R. v. Wheatley*,

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MARSH
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*Attempt to
defraud—
Indictment.*

Case.

Bliss, for the
prisoner.

REG. 2 Burr. 1125; *R. v. Lara*, 6 T. R. 565; *R. v. Mason*, 2 T. R. 581; Stark. Cr. Pl. 95.) Further, the count does not allege whose property was obtained: (*R. v. Martin*, 8 Ad. & Ell. 481; *R. v. Norton*, 8 Car. & P. 196.)

*Attempt to
defraud—
Indictment.*

No counsel appeared on the part of the crown.

POLLOCK, C. B.—We all think the objections well founded.

Judgment arrested.

COURT OF CRIMINAL APPEAL.

(Before POLLOCK, C. B.; PATTESON, J.; WIGHTMAN, J.;
PLATT, B.; and TALFOURD, J.)

REG. v. ROWLAND GALLEARS. (a)

Larceny—Description of thing stolen.

An indictment charged the prisoner with stealing "one ham."

Held, that it sufficiently described an article which was the subject of larceny.

THE following case was reserved by the chairman of the quarter sessions at Shrewsbury:—

The prisoner was indicted for stealing on the 29th day of April, 1849, at Cordover, in the county of Salop, "one ham" of the value of 10s., of the goods and chattels of one Thomas Heighway; to which indictment the prisoner pleaded not guilty. Whereupon, evidence in support of the prosecution having been adduced, it was objected by *Mr. Kenealy*, as counsel for the prisoner, that he could not be convicted of felony, inasmuch as it did not sufficiently appear by the indictment, that the article stolen was the subject of larceny, it being urged by the counsel that it might have been the ham of an animal *feræ naturæ*. The court overruled the objection, reserving the question of law. The counsel for the prisoner having addressed the jury, they found the prisoner guilty of the said offence; the court thereupon sentenced him to one month's imprisonment, but respited the execution of the sentence, and took a recognizance of bail. The question as to the sufficiency of the indictment is submitted to the consideration of Her Majesty's judges.

Henniker, for the prisoner.—"Ham" does not mean the salted flesh of swine. It means part of the hind leg (*Richardson's Dict.*); and may have been the ham of a wild boar. The flesh of animals *feræ naturæ*, which is not fit for food, is not the subject of larceny: (1 Hale, 511; 3 Inst. 110.) In *R. v. Car* (1 Car.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

& K. 494), an indictment which charged the stealing of "three eggs" was held bad, because the eggs might have been adder's eggs, or some other species of eggs which could not be the subject of larceny.

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—
Larceny.
—

POLLOCK, C. B.—If that case had come before me, I should have thought differently. It does not appear to have received much consideration. Would it not be larceny to steal a stuffed panther?

PATTESON, J.—The doctrine referred to applies to live animals, *feræ naturæ*—not to a part of a dead animal. I cannot understand the objection; suppose it is the ham of a wild boar, it may still be the prosecutor's property.

Henniker.—The same thing might have been said in *R. v. Cox*. But the only question here is, whether there is a sufficiently certain description of the article stolen. Would an indictment be good which charged the stealing of one leg?

POLLOCK, C. B.—The very circumstance of its being cut up shows that it is the subject of larceny.

PATTESON, J.—There is no such animal known in natural history as a ham.

POLLOCK, C. B.—We have no doubt that the conviction is right.
Conviction affirmed.

COURT OF CRIMINAL APPEAL.

REG. v. WILLIAM THRISTLE.(a)

November 20, 1849.

Larceny—Taking unimo furandi—Subsequent appropriation.

If at the time of the taking of a chattel there is no animus furandi, a subsequent fraudulent appropriation of it will not make the entire transaction larceny.

The prisoner being a watchmaker received a watch from the prosecutor to be repaired, not then intending to steal it. But in a few days he went away, taking the watch with him; and when taken into custody he said "I have disposed of the property and it is impossible to get it back."—

Held that there was no evidence of a larceny.

THE two following cases were reserved by the Worcestershire Court of Quarter Sessions:—

FIRST CASE.

The prisoner, William Thistle, was indicted at the Worcester Quarter Sessions, 15th October, 1849, for stealing one watch, the property of Robert Warren.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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v.
THRISTLE.
—
Larceny.

It appeared in evidence, that the prosecutor, in 1848, met the prisoner, who was a watchmaker at Malvern. The prosecutor asked prisoner if he was going as far as prosecutor's house; the prisoner said "yes," if the prosecutor had anything for him. The prosecutor said his watch wanted regulating, if prisoner would call.

The prisoner went to the prosecutor's house, and after examining the watch, told the prosecutor's wife that he could do nothing with it there, but must take it to his own house. The prisoner then took it, and on his way home met the prosecutor, to whom he mentioned that he was taking the watch to his own house, and would return it in two or three days. Prosecutor made no objection.

Case.

In a few weeks after, prisoner left the neighbourhood without returning prosecutor's watch, and it was not afterwards heard of. The prisoner, on being taken into custody, said, "I have disposed of the property, and it is impossible to get it back."

The jury returned a verdict of guilty, but the chairman being of opinion that there was no evidence of a felonious taking, when the prisoner first took the watch from the prosecutor's house, with the knowledge and in the presence of the prosecutor's wife, and entertaining doubt whether the prisoner's subsequent appropriation of the watch could, under the circumstances above detailed, constitute larceny, requests the opinion of this court as to the correctness of the conviction in point of law.

SECOND CASE.

The same prisoner was also indicted at the same sessions, for stealing one watch, the property of the prosecutor, Thomas Reynolds. It appeared in evidence, that the prisoner, who was a watchmaker at Malvern, received from the prosecutor some time in January, 1848, his silver watch to repair. The prisoner returned it to the prosecutor. A few days after the prisoner had so returned it, the prosecutor told the prisoner that the watch gained. The prisoner said, that if the prosecutor would let him have it again, he would regulate it, and return it in a day or two. The prosecutor thereupon gave the watch to the prisoner, who, in eight or nine days, left Malvern with the prosecutor's watch in his possession, and was not again heard of until he was arrested on the present charge some time afterwards.

The prosecutor was unable to say whether he had paid for the repairs of his watch or not, but stated that the prisoner, when he left Malvern, had other repairs of the prosecutor's on hand and unfinished.

The prisoner, when taken into custody, said, "I have disposed of the property, and it is impossible to get it back."

The jury found a verdict of guilty, but the chairman being of opinion that there was no evidence of a felonious taking on the part of the prisoner, when he received the watch from the prosecutor

to regulate it, and entertaining a doubt whether the subsequent departure of the prisoner from Malvern with the prosecutor's watch in his possession, could, under the circumstances above detailed, constitute larceny, requests the opinion of this court, as in the former case.

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Larceny.

[See 2 Russ. on Crimes (last ed.), p. 56; where it is said, "where it appears that the delivery of the goods by the owner or person authorized to dispose of them was not obtained fraudulently and with intent to steal, a remaining inquiry may be, whether such lawful possession has been determined, and whether there has been any new and felonious taking. Thus it has been held, that if a carrier take a pack of goods to the place appointed, and deliver or lay it down, his possession is determined, and if he afterwards carry it away with intent to steal it, this will be a new taking and felonious: (3 Inst. 107; 1 Hale, 505.) If the lawful possession has not been determined, the goods will continue in the possession of the party to whom they were delivered by bailment, and the general principle of law will prevail, "that if a person obtain the goods of another without fraud, although he have the *animus furandi* afterwards and convert them to his own use, he cannot be guilty of felony:" (3 Inst. 107; 2 East P. C. c. 16, s. 113.) A principle which has been holden to extend to the cases of a tailor, who has cloth delivered to him to make clothes with; a carrier who receives goods to carry to a certain place; and a friend, who is entrusted with goods to keep for the use of the owner; which they afterwards severally embezzle: (Staundf. P. C. c. 25; 1 Hale, 504, 505; 1 Hawk. P. C. c. 33, s. 2.) And so, if a watch be delivered to a person to mend, and he sells it, this has been held not to be larceny: (*R. v. Levy*, 4 Car. & P. 241.) And so, also, if plate be delivered to a goldsmith to work or to weigh, or as a deposit, it has been held, that his conversion of it will not be a felony: (3 Hen. 7, pl. 12, cited 1 Show. 52; 2 East P. C. c. 16, s. 113.) It has, however, been already noticed, that some of the cases of this nature seem to make a near approach to those where a bare charge or mere special use of the goods is transferred by the delivery, and where consequently the legal possession of them remaining exclusively in the owner, larceny may be committed in respect of them, exactly as if no delivery at all had been made:" (see also *R. v. Thurborn*, 1 Den. C. C. 387; S. C. *nom. R. v. Wood*, 3 Cox's Crim. Cas. 453; *R. v. Stear*, 1 Den. C. C. 349; 3 Cox's Crim. Cas. 187.)

These cases were not argued by counsel, but were considered by the following Judges:—Pollock, C. B.; Patteson, J.; Wightman, J.; Platt, B.; and Talfourd, J.

POLLOCK, C. B., delivered the judgment of the court.—The indictment was for stealing a watch; and the circumstances set out in the case do not, on the question of fact, justify the verdict of guilty; but in giving our judgment that the conviction is wrong, we do not proceed merely upon the facts stated. The

Case.

Judgment.

REG.
v.
THRISTLE.
—
Larceny.
—

question put to us in the conclusion of the case seems to be this:—The chairman doubted whether a subsequent appropriation could make the entire transaction a larceny, there not having been at the time of the taking any *animus furandi*; and I think we are bound to take it that he directed the jury that the subsequent appropriation might render the transaction larceny, though there was not any intention to steal at the time of the taking; and, indeed, the chairman's opinion seems to have been, that there was not the *animus furandi* at the time of the taking; and the question is, whether he was right in his direction. We think not, for unless there was a taking *animo furandi*, no dishonest appropriation afterwards could make it larceny.

Conviction reversed.

COURT OF CRIMINAL APPEAL.

REG. v. JOHN BOULTON. (a)

November 20, 1849.

False pretences—Obtaining a railway ticket.

A railway ticket entitling a passenger to travel upon a railway to a certain place, without any further charge, is a chattel of value, within the meaning of 7 & 8 Geo. 4, c. 29, s. 53; and a person obtaining such a ticket by false pretences from a servant of the railway company is guilty of a misdemeanor.

THE prisoner was convicted before Wightman, J., at York, when the following case was reserved by the learned judge:—

The prisoner was convicted at the Yorkshire Summer Assizes, 1849, before me upon the sixth count of an indictment, charging him with obtaining by false pretences from a servant of the Yorkshire and Lancashire Railway Company, a railway ticket of the company for a journey from Bradford to Huddersfield by one of their trains.

The count was as follows:—

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said John Boulton afterwards, to wit, on the 11th day of April, in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly, did falsely pretend to one Charles Turner, he the said Charles Turner being then and there a servant of the said Lancashire and Yorkshire Railway Company, that a certain ticket which he the said John Boulton then and there delivered to the

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

said Charles Turner was then and there a genuine ticket of the said company, before then obtained by him the said John Boulton from the said company, for the conveyance of him the said John Boulton as a passenger, in and by certain carriages of the said company, from the said town of Bradford to Huddersfield aforesaid, on the said 11th day of April, by means of which last-mentioned false pretences, the said John Boulton did then and here unlawfully obtain from the said Lancashire and Yorkshire Railway Company, a certain chattel, to wit, a printed ticket of the said company, authorizing the bearer thereof to be thereafter conveyed without further charge or payment in that behalf, by certain carriages of the said company, on the said 11th day of April, from the said town of Bradford to Huddersfield aforesaid, the said last-mentioned ticket being then and there the goods and chattels of the said Lancashire and Yorkshire Railway Company, and of the value of, &c., with intent thereby then and there to cheat and defraud the said Lancashire and Yorkshire Railway Company of the same. Whereas, in truth and in fact, the said ticket so delivered as last aforesaid, by the said John Boulton, was not a genuine ticket of or obtained from the said company for the conveyance of any person as a passenger by any carriage of the said company, or any journey whatsoever, to the great damage and deception of the said company, to the evil example of all others in the like case offending, and against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. The ticket of the company is in the annexed form:—

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v.
BOULTON.
—
False
pretences—
Railway
ticket.
—

| | | |
|----------------|------------|-------|
| EXPRESS TRAIN. | | |
| BRADFORD | | |
| to | | |
| HUDDERSFIELD. | | |
| April 11. | 23. | 1536. |
| 1st Class. | | |
| 23. | 1st Class. | 23. |

And is a voucher for the journey without further payment, but is to be given up to the company at the journey's end.

The prisoner was stopped upon the line before he finished his journey, and was taken into custody with the ticket in his possession.

The question upon which I desire the opinion of the judges, is whether the obtaining such a ticket was obtaining a chattel of the company with intent to defraud the company of the same, within the meaning of the act of Parliament.

The case was not argued by counsel, but was considered by the following learned judges:—Pollock, C. B.; Patteson, J.; Wightman, J.; Platt, B.; and Talfourd, J.

REG.
v.
BOULTON.
—
*False
pretences—
Railway
ticket.*
—
Judgment.

POLLOCK, C. B., delivered the judgment of the court.—This was a conviction for obtaining a railway ticket by means of false pretences; and we think that it is within the statute which makes it penal to obtain "a chattel" by false pretences. The ticket which entitled the bearer to travel without further payment was something of value, and the obtaining it by false pretences from a servant of the company was, in our opinion, an obtaining of a valuable chattel with intent to defraud the company. Although at the end of the journey it was to be returned according to the ordinary mode of managing the affairs of the company, that does not prevent it, whilst it is out and confers the privilege of travelling *gratis*, from being an article of value, obtained by the false pretences generally alleged in the indictment, and particularly proved at the trial.

Conviction affirmed.

CENTRAL CRIMINAL COURT.

JUNE SESSION.

June 11, 1849.

(Before the RECORDER.)

REG. v. WOLF, PRIDMORE, and OTLEY.(a)

Indictment for keeping a disorderly house, under 25 Geo. 2, c. 36.

A room within twenty miles of the cities of London and Westminster, used for the purpose of music and dancing, and to which the public are admitted on payment of money, is a disorderly house within the 25 Geo. 2, c. 36, s. 2, unless it has been duly licensed, although no improper or disorderly conduct is allowed in the said room.

The onus lies upon the defendant of proving that he has a licence. One of the defendants had his name over the house as a free vintner, and another had contracted to supply the visitors with refreshments, but neither took any acting part in the management, although they were sometimes seen in the room.

Held, that they were not shown to be persons having the management within the 8th section.

Indictment.

THE indictment charged the defendants that they, "on the 10th day of January, in the year of our Lord 1848, and on divers other days and times between that day and the day of taking this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, and within twenty miles of the cities of London and Westminster, unlawfully did maintain and keep a certain room and place for public music and dancing, situate in the parish of St.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

anne, Westminster, in the county of Middlesex aforesaid, and within twenty miles of the cities of London and Westminster, without a licence had for that purpose from the last preceding Michaelmas Quarter Sessions of the Peace for the county aforesaid, signified under the hands and seals of four or more of the justices here assembled at such sessions, according to the directions of the statute in such case made and provided, to the great damage and common nuisance of all the liege subjects of our Lady the Queen, against the form of the statute in such case made, and against the peace of our Lady the Queen," &c.

REG. v. WOLF
AND OTHERS.

Disorderly
house—
Evidence.

The room in question was called "The Walhalla," in Leicester-square, and it was proved that nightly entertainments were there given, when music and dancing were carried on—the public being admitted on paying money at the door. There were often from 200 to 300 visitors, who conducted themselves in an orderly and respectable manner, and no impropriety of conduct was permitted or practised in the room. Wolf supplied refreshments; Pridmore had a private room in the house, and had his name on a brass plate over a bell in the outer door-post. He had once been before a magistrate to make some charge against one of the waiters, and had then said he was the proprietor of the Walhalla. Before the room was opened as a dancing room he had given orders to a house decorator to fit it up, and had paid the latter his bill. Otley had his name up over the outer door, with the words "Free Vintner" attached to it. All of the defendants had been seen in the room at different times, but no act of theirs was shown to connect them with the management of the room.

Evidence.

Parry (for the defendants), submitted that upon this evidence they must be acquitted.—First, there was no proof that the defendants kept the house. Secondly, it was not proved to be unlicensed; neither was it shown to be disorderly. [THE RECORDER.—Surely if the prosecutor shows that this is a house that ought to be licensed, it is for the defendants to show that it is so. Then must it be disorderly in fact or disorderly by construction of law. The preamble of the 25 Geo. 2, c. 36, speaks of such assemblies leading to robbery.] The preamble stated that "whereas the multitude of places of entertainment for the lower sort of people is another great cause of thefts and robberies," &c. This clearly showed to what object the statute was applied. It was meant to repress the nightly assemblage of persons among the lower orders under circumstances in which crime was likely to be concocted. It was admitted here that the house was quietly and properly conducted, and no imputation, therefore, was cast upon the management. A licence was not necessary to enable the proprietors of the London Tavern to have a concert at their house. A ball might be given at Guildhall without one, and, see *Bellis v. Burghall* (2 Esp. 722), why should a licence be necessary here? But supposing it ought to be licensed, there was not sufficient evidence that the defendants had anything to do with the management to make them responsible. Management and control must be distinctly proved; it surely could

Parry, for
defendants.

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Disorderly
house—
Evidence.

not be inferred from a contract to supply the room with refreshments, which was quite consistent with the fact of the contractor knowing nothing of the purpose which his employer had in view. Such a contract might be made by a person a hundred miles away, and his having been seen at the house was no answer to such a suggestion; still less did it fix upon him any share in the management. Another defendant was proved to have had his name and his calling over the door, but there were other rooms in the house to which these might have reference. The third defendant was shown to have given orders for decorating the rooms, but this was before their use as dancing rooms, and might have been done with quite a different object.

Clarkson and Ballantine (for the prosecution.)—The only question was this: Was the room kept for public music and dancing? If so, it was clear the statute applied. *Bellis v. Burghall* was not a case of public, but of private, dancing at a dancing master's. *Mark v. Benjamin* (5 M. & W. 565), showed that taking money for admission, and admitting any person who was willing to pay money, made a room public within the act. It was not necessary that any conduct, disorderly in the strict sense of that word, should be shown. There was a statement in the act of what should be considered a disorderly house, and an unlicensed house for public music was there named. Then, a *prima facie* case being made out, it was for the defendants to rebut it, if they could, by showing those facts which were peculiarly within their own knowledge, and which the prosecution could not be expected to negative. If the house was licensed, it could easily be proved. If the name and calling of one of the defendants had no reference to this particular room, why not show what other room it referred to? It was not necessary that actual management should be proved. If these persons were leagued together for the purpose of carrying on this business, they would all be principals in contemplation of law, although they did not actively interfere in the control of the establishment.

Parry replied.

THE RECORDER.—The first question is, does this house require a licence? The act seems directed against a lower class of people, and was no doubt originally intended to put down houses and rooms really disorderly, but kept under pretence of their being used for music and dancing, and this supposition is strengthened by the very extraordinary provision that is contained in it, that every person found there may be apprehended and dealt with as a disorderly person. But the act is so framed as to compel me to put upon it a strict and literal construction. Many of the circumstances that probably conduced to the passing of it have passed away, but while the statute exists it must be enforced. Being then a house used for public music and dancing, I think a licence was requisite; and not having one, however well and quietly conducted, it is a disorderly house within the statute. As to the liability of the defendants, it is entirely a question for the jury. I think, however, there is not sufficient evidence to convict either

Wolf or Otley. As to Pridmore, the mere order to decorate the room might fall short of sufficient proof, but he admits proprietorship, and the jury must decide whether, on the whole, he is identified with the management.

Pridmore, *Guilty*.

Wolf and Otley, *Not Guilty*.

Clarkson and Ballantine, for the prosecution.

Parry, for the defence.

REG. v. WOLF
AND OTHERS.

Disorderly
house—
Evidence.

CENTRAL CRIMINAL COURT.

MAY SESSION.

May 12, 1849.

REG. v. BAKER. (a)

Sacrilege—Burglary in church—Stealing fixtures—7 & 8 Geo. 4, c. 29, ss. 10 and 44.

Burglary may be committed in a church at common law.

To warrant a conviction for breaking and entering a church under 7 & 8 Geo. 4, c. 29, s. 10, there must be a stealing therein of some chattel. Stealing a fixture will not be sufficient.

But if the stealing of fixtures is averred in such count, the prisoner may be convicted simply thereof under the 44th section of that statute.

THE prisoner was indicted for burglariously breaking and entering a church, with intent to steal, and stealing therein certain chattels, and for breaking and entering, &c., and stealing certain fixtures *contra formam statuti*. The breaking was sufficiently proved, as was also the wrenching off of gas burners, money boxes, and other things affixed to the building, but no mere chattel was removed.

Payne, for the prisoner, submitted that a church was not a building in which burglary could be committed. There were acts of Parliament which particularly related to offences respecting churches, and these overrode the common law, which, without them might have been applicable.

ALDERSON, B.—But they do not destroy the offence at common law.

Payne contended that the description of the offence, at all events, was the same. A church was the dwelling-house of the Almighty, but could not be looked on as a dwelling-house in the ordinary or statutable sense.

ALDERSON, B.—I take it to be settled law that burglary may be committed in a church at common law. I so held lately, on circuit.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

REG.
v.
BAKER.
—
*Sacrilege—
Burglary in
church.*
—

But there is no proof here that the breaking was in the night time, therefore, the burglary is not made out, neither is the statutable offence proved of breaking and stealing, which requires that some chattel should be stolen. Here fixtures alone are taken.

Metcalf, for the prosecution, submitted that there was still a case left for the jury. A count in the indictment averred that fixtures were stolen, and concluded "against the form of the statute." The part of the count as to the breaking might, therefore, be dropped, and the prisoner convicted of stealing fixtures under 7 & 8 Geo. 4, c. 29, s. 44.

ALDERSON, B.—I think that is so, and shall leave the question to the jury accordingly.

The prisoner was convicted of a larceny of fixtures.

Metcalf for the prosecution.

Payne for the defence.

CROWN CASE RESERVED.

December 8, 1849.

REG. v. GEORGE HEY. (a)

Larceny—Servant or bailee.

A. employed B., a drover by trade, to take pigs to C., and to bring back such sum as C. should give him, on being shown a paper given to B. for that purpose. B. had no authority to do anything but deliver the pigs to C. B. took them to the house of C. at an hour in the morning when the inmates were in bed. C. himself was not at home; and the persons who spoke to B. from the window of the house gave him no instructions. B. then sold the pigs to another person and absconded with the price. He had received 2l. from A. for expenses, for which he was to account; and by custom he was entitled to receive a sum per day for the time occupied, and also to drive cattle for any other person at the same time.

Held (dissentiente LORD DENMAN, C. J.), that these facts did not prove B. to be a mere servant of A.; and that, therefore, he had been improperly convicted upon an indictment which charged a larceny of the pigs. If he was a bailee, he could not be guilty of larceny, unless he intended, at the time of the receipt of it, to appropriate the property to his own use; and there was no evidence of any such intention.

The case of Rex v. McNamee (1 Moo. C. C. 368,) questioned.

THE following case was reserved by Robert Hall, Esq., sitting as Assistant Recorder for the borough of Leeds:—

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

"Borough of Leeds, } At the Leeds Christmas Sessions, A.D. 1848, George Hey was tried before me as
 in the } Assistant Barrister for the borough of Leeds
 County of York. } (under stat. 7 Will. 4 & 1 Vict. c. 19), on an indictment which charged that he, whilst the servant of William Richardson and another, stole ten pigs, the property of his said masters."

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 ———
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It appeared in evidence, that on the 26th of September, 1848, Richardson and Lambert, the prosecutors, pig-jobbers at Newcastle, having purchased pigs which they knew would suit Goose, a pig-dealer at Leeds, engaged the prisoner, a butcher and drover at Newcastle, to go with the pigs by railway from Newcastle to Leeds, and there deliver them to Goose, and bring back to the prosecutors such sum in post-office orders or a banker's cheque as Goose should give him, on being shown a paper which the prosecutors gave to the prisoner for that purpose; the contents of which paper were not given in evidence, the prisoner having had no notice to produce, and not producing it.

The prisoner had no authority to sell the pigs or to do anything with them but deliver them to Goose, and no instructions were given him as to what he was to do with them should Goose refuse to accept them. The prisoner took the pigs to Leeds, and went with them to Goose's house there, before six o'clock, A. M., of the 27th of September, whilst all the inmates were in bed. Goose himself was from home at the time, but his wife being awakened by the prisoner called up a man to whom she referred the prisoner, and returned to bed. That man merely looked out of the window, said, "Is that you?" then shut the window and disappeared, as if returning to bed, without listening to the prisoner or giving him any directions. The prisoner then took the pigs to the Leeds Pig Market, and called up a pork butcher, to whom he sold them between the hours of six and seven o'clock of the same morning, received the price, 26*l.*, and absconded with it, making no communication of any kind or at any time to the prosecutors.

It appeared that the prisoner had frequently been employed by the prosecutors in the capacity of a butcher, to slaughter and cut up pigs, &c., for which he was paid by the job, but he had never before been employed by them as a drover. He had 2*l.* given him for expenses, for which he was to account; nothing was said as to the manner in which he was to be paid for his trouble, but there was an established custom in the trade to remunerate drovers for such services by payment of a sum per diem for the number of days occupied. Nothing was expressed on the subject of the prisoner's being at liberty to drive cattle for any other person at the same time, but by the usage of the trade he was at liberty to do so.

The prisoner's defence was, that he was in partnership with the prosecutors, and took the pigs to Goose's house, not in pursuance of any directions, but as to a likely customer of his own selection, and not being attended to there, he sought out another customer. If the witnesses spoke the truth, this defence was entirely false.

REG. v. HEY. There was no evidence of any intention on the part of the prisoner to steal the pigs at the time of their being delivered to him. Nevertheless I doubted whether the prisoner was, under the circumstances, a servant; and, also, whether there was a taking by him, which amounted to larceny (*Reg. v. Goodbody*, 8 C. & P. 665); but *Reg. v. Hughes* (R. & M. C. C. R. 259,) being cited, I felt bound, by the case last mentioned, and directed the jury, that if they believed the witnesses, the prisoner was the servant of the prosecutors, and that the taking amounted to larceny if the prisoner had sold the pigs for the purpose of appropriating the proceeds to his own use, and not for the benefit of his employers on what he considered to be an emergency not provided for by his instructions.

Case. The jury having found the prisoner guilty, I postponed judgment, under stat. 11 & 12 Vict. c. 78, in order to take the opinion of the court under that statute, whether, under the circumstances, the prisoner was the servant of the prosecutors, and whether the taking amounted to larceny.

The case was set down for argument on the 20th of January 1849, before Lord Denman, C. J.; Parke, B.; Alderson, B.; Coleridge, J.; and Coltman, J.; but no counsel were instructed to argue it. The case was, however, referred back to *Mr. Hall* for amendment; and was ultimately considered by the judges in the form above stated. *Cur. adv. vult.*

JUDGMENT.

Judgment.

PARKE, B., now delivered the judgment of the court.

In this case Lord Denman does not concur with the majority of the judges, and if the defendant had not been in prison we should probably have postponed our judgment on that account.

(The learned Baron then read the case.)

The only question is, whether, on the facts stated in this case, as amended, the prisoner received the custody of the pigs as a servant of the prosecutor, or as a bailee; in the latter case he could not be guilty of larceny, unless he had intended to appropriate them to his own use at the time of the receipt, which was not the case. In the former, he would be guilty of larceny, according to the finding of the jury, as to which they were properly directed by the learned Assistant Recorder.

There are several reported cases bearing upon the question, whether a person is a mere servant or bailee; there are none precisely like the present, though the case of *Rex v. McNamee* (1 Moo. C. C. 368,) nearly approaches to it.

In this case, on the one hand, the circumstance that the prisoner was paid the expenses of taking the cattle, and also that the customary mode of payment of his remuneration was by the day, tends to show that he was a mere servant; on the other, the fact of his being a drover by trade, and also of his having the liberty to

drive the cattle of any other person, by the general usage with respect to drovers, raises an inference that he was not a servant. REG. v. HAY

The learned Deputy Recorder felt himself bound by the decision of the judges, in the case of *Reg. v. Hughes* (1 Moo. C. C. 370), but that case was under 7 & 8 Geo. 4, c. 29, s. 47, which makes the embezzlement by a servant or person employed in the capacity of a servant to receive money, felony; and the learned Recorder of London referred the question to the judges, whether the prisoner fell under either description, though, if the indictment had been referred to, it was necessary to prove that he was a servant. The judges decided that the prisoner was properly convicted, and consequently, that he was a servant or person employed in that capacity, and authorized as such to receive money, so that his receipt would be a discharge to the debtor. This is not exactly the same question: it is whether the prisoner had the custody of the cattle as a servant to the prosecutors at the time of the receipt of them; and we think he could not be so considered, unless, in driving the cattle to the market, he was their servant, and the prosecutor responsible for any negligent act of his in so driving them. Larceny
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Judgment.

This subject has undergone much discussion of late, and has been placed on its proper footing by the case of *Quarman v. Burnett* (6 M. & W. 499), and other cases, one of which is that of a general drover, who was held in *Milligan v. Wedge* (12 Ad. & Ell. 737; 10 L. J. 19, Q. B.) not to be a servant, so as to make the owner of the cattle responsible for his negligence.

After the full consideration which this subject has undergone, we doubt whether the case of *Rex v. McNamee*, above referred to, would be now decided in the same way.

Upon the whole, we think it was not proved, in this case, that the prisoner was a mere servant, and the conviction was improper.

POLLOCK, C. B.—I have only attended for the purpose of forming a court, but I may state that I entirely concur in opinion with the majority of the judges.

Conviction reversed. (a)

(a) The following is the marginal note to the case of *Rex v. Bernard McNamee*: "If a man who is hired to drive cattle, sell them, it is larceny, for he has the custody only, not the right to the possession. His possession is the owner's possession, though he is a general drover, at least if he is paid by the day."

COURT OF QUEEN'S BENCH.

June 4, 1849.

JOHN SMITH, in Error, v. THE QUEEN.(a)

Jurisdiction of justices at Quarter Sessions during the Assizes.

A Court of Quarter Sessions may be legally held by the justices of a county or the recorder of a borough during the sitting of the judges of assize, under the ordinary Commissions of Oyer and Terminer and General Gaol Delivery in the same county; for the Assize Court is not a Court of Error from the Quarter Sessions, nor are the Commissions of Oyer and Terminer and Gaol Delivery similar in their nature to the commission of the peace; but it would be highly inconvenient and improper for magistrates to adopt the practice of holding their sessions concurrently with the assizes, even in a different part of the county.

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THIS was a writ of error upon a judgment of transportation pronounced by the Recorder of Manchester at the Quarter Sessions for that borough, held on the 3rd of April, 1848. The record commenced with the following caption:—

Record.

“Borough of Manchester, } Be it remembered, that at the
in the county of Lancaster, } General Quarter Sessions of the
to wit. } Peace of our Sovereign Lady the
Queen, holden at Manchester, in the county of Lancaster, in and
for the borough of Manchester, on the 3rd day of April, &c., before
R. B. Arnstrong, Esquire, the recorder of the said borough, the
justice of, &c., assigned to inquire the truth more fully by the oath
of good and lawful men of the said borough, &c., of all and all
manner of felonies, &c., of which justices of the peace, &c., might
or ought lawfully to inquire, by whomsoever and in what manner
soever in the said borough done or perpetrated, &c., and to hear
and determine all and singular the felonies, misdemeanors, and
offences aforesaid, according to the laws,” &c.

*Assignment of
errors.*

The indictment upon which the plaintiff in error was convicted, charged him with breaking and entering a dwelling-house, and stealing therefrom, and with a previous conviction for felony.

The errors assigned were, in substance, that a Session of Oyer and Terminer and General Gaol Delivery, before Baron Alderson and Baron Rolfe, was commenced at Liverpool, for the southern division of Lancashire, in which the borough of Manchester is situate, on the 24th of March, 1848, and continued by adjournment from day to day until the 8th of April; and that the

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

indictment against the plaintiff was found on the 3rd of April; and that he was tried and found guilty on the 6th.

The joinder in error was merely *in nullo est erratum*.

The case was first argued during the sittings in banco after Michaelmas Term, 1848 (December 9), before Lord Denman, C.J., and Patteson, J.(a)

Hodges, for the plaintiff in error.—The authority of a recorder is suspended whilst the General Commission of Oyer and Terminer and Gaol Delivery is in force in the county. First. Upon general principles, the authority of justices of the peace is suspended by the presence of a higher authority; and, therefore, the commission under which the judges of assize act, suspends for the time the commission of the justices at Quarter Sessions. The principle applies to all courts, *in præsentia majoris cessat potestas minoris*. Thus, the Court of Queen's Bench is supreme; indeed, "so high is the authority of this court, that when it comes and sits in any county, the justices of Eyre, of Oyer and Terminer, Gaol Delivery, they which have conusance, &c., do cease without any writing to them:" (4 Inst. 73.) This it was which rendered necessary the stat. 25 Geo. 3, c. 18, which was an act "to empower the justices of Oyer and Terminer and Gaol Delivery of Newgate, for the county of Middlesex, to continue to hold a session of gaol delivery of Newgate, begun to be holden before the essoign day of the term and sitting of the King's Bench, at Westminster, notwithstanding the happening of such essoign day and the sitting of the said Court of King's Bench at Westminster, or elsewhere in the said county of Middlesex." The stat. 32 Geo. 3, c. 48, was passed for the same purpose. The justices in Eyre derived their authority from the King's writ, in the nature of a commission; they had jurisdiction of all pleas of the crown, and all actions, real, personal, and mixed; and "in what county soever they came all other courts during the Eyre ceased" (4 Inst. 184); even the Court of Common Pleas; but they yielded to the King's Bench: (p. 185.) The judges on circuit now exercise much the same power as was formerly exercised by the justices in Eyre: (1 Reeve's Hist. of English Law, 52.) In 2 Hawk. P. C. lib. 2, c. 3, s. 11. it is said, "as to the third point, viz., how far the presence of this court suspends the power of all other courts, it is certain that this being the Supreme Court of Oyer and Terminer, Gaol Delivery, and Eyre, doth so far suspend the power of all other justices of this kind in the county wherein it sits, during the time of its sitting in it (if such justices have notice of its sitting there, and even without such notice as some say), that all proceedings commenced before any such justices during such time are void, yet it seems that such justices may proceed upon indictments taken in a foreign county and removed before them, because the Court of King's Bench have nothing to do with such indictments, unless they be removed into it. Also, there seems to be the same reason that such justices may proceed

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Argument for
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(a) Coleridge, J. left the court during Mr. Hodges' argument.

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upon indictments taken before them of offences in the same county, before the term; for it is said in Keilw. 152, that if an appeal be commenced before justices in Eyre, and afterwards another appeal be brought in the King's Bench, it will be a good plea that another appeal is depending, which shows that the King's Bench ought not, without a *certiorari*, &c., to intermeddle in an appeal whereof another court is legally possessed before; and the reason seems to be the same as to indictments; and it is said in the same book, that 'if the King's Bench and justices in Eyre are in one county, yet this shall not change the power of the justice in Eyre; but that if the King will make process for anything not commenced before the justices in Eyre, as to such thing their power is ceased,' by which it seems to be implied, that as to what was commenced before them, their power continues; however, it is certainly the safest way for any of the justices above mentioned, proceeding on any such indictment, to have a special commission for that purpose, and it is most advisable that such commission bear teste in the term.' In *Lord Sanchar's case* (9 Rep. 118), "it was moved that if the Lord Sanchar could not in term time be indicted, arraigned, and convicted at Newgate before commissioners of Oyer and Terminer for the county of Middlesex, and it was resolved he could not, for the King's Bench, as has been said, is more than Eyre, and, therefore, in term time, no commission of Oyer and Terminer, or Gaol Delivery, by the common law, can sit in the same county where the King's Bench sits, for *presentiâ majoris cessat potestas minoris*, and therewith agrees" (27 Ass. p. 1.) Second. The rule is in some places laid down generally that a second commission of the same kind destroys the first. Thus, in *Lacey's case* (1 Leon. 270), it is laid down that a general commission of Oyer and Terminer for a county at large, is determined *pro tanto* by a subsequent special commission for a town, and *é converso*. In Bro. Abr. "Commission," 145, pl. 6, "if a new commission of the peace be proclaimed in a county, the former commission of the peace is determined; and if justices act under the former commission, all they do is void;" and (pl. 8), "if a commission be directed to hear and determine, this will determine the former commission of the peace *as to felonies*, not as to the peace, and thus it determines in part and not in part." That is the present case. In Keilw. p. 116, it is also said that one commission of assize, with notice, determines a former one. [COLERIDGE, J.—The commission of the recorder, if it can be so called, was subsequent.] No; only the date of holding the sessions. [COLERIDGE, J.—At all events it cannot be correct to say that the commission of the justices of the peace is determined by the commission of the judges of assize.] It is, at least, suspended whilst the commissioners under the second commission are sitting in the county. The justices of the peace, although originally mere conservators of the peace, were by the stat. 18 Edw. 3, stat. 2, c. 2, made Commissioners of Oyer and Terminer. In *R. v. Smith* (8 B. & C. 343), Lord Tenterden describes the justices in sessions as a Court of Oyer and Terminer, and in that form the

commission runs: (2 Hale's P. C. p. 9.) It is true that notice of the new commission must be given; but the holding of a session under it is sufficient notice: (2 Hawk. c. 5, s. 10.) This state of the law is recognized in several statutes which have been passed for the purpose of remedying the inconvenience which in certain cases would be the consequence of it. (He referred to 11 Hen. 6, c. 6; 1 Edw. 6, c. 6; 25 and 32 Geo. 3, above cited; and 4 Bl. Com. (Ed. Col.) 265.) The stat. 4 & 5 Will. 4, c. 47, is a remarkable instance. The stat. 1 Will. 4, had required that the sessions should be held at certain fixed dates; but it was found that the day fixed for the commencement of the Easter Sessions might occasionally happen during the spring circuit of the judges of assize; and for the express purpose of avoiding that difficulty the 4 & 5 Will. 4, c. 47, was passed, enabling the justices to alter the time for holding the Easter Sessions. This is the case of a recorder; but the same principle applies to recorders and to county justices. The commissions of Oyer and Terminer and Gaol Delivery are in perfectly general terms, and some judges insist upon clearing the gaols of the county. The duty of the sheriff is to bring all the prisoners in the county before the judges; how then can the justices at the same time require him to bring them before them? If they had the authority, there might be a most unseemly race between the two jurisdictions: and Coleridge, J., on one occasion expressly advised that it should not be done: (9 Car. & P. 790.) [LORD DENMAN, C. J.—But he did not regard the justices' commission as suspended.] The Municipal Corporations Act (5 & 6 Will. 4, c. 76), gives to recorders the powers possessed by justices at Quarter Sessions; and the commission of the peace directs justices at their sessions not to entertain matters of moment except with the assistance of the judges of assize.

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M. D. Hill (with whom was *Pashley*) for the crown.—The argument on the part of the plaintiff in error is founded in misconception. It is assumed that the jurisdiction of county justices, or of a recorder at Quarter Sessions, is determined or suspended, because it is laid down in various old authorities, that when the Court of Queen's Bench comes into a county, the jurisdiction of all other courts therein ceases; but the reasons for that doctrine are sufficiently obvious. The king or queen is always supposed to be present in that court; and as the authority of all courts is derived from the crown, the doctrine now relied upon is a mere consequence of the general principle that the authority of the agent ceases when the principal is present. That observation applies to *Lord Sanchar's case* (9 Rep. 118), and to the statutes, which have been passed to authorize Commissioners of Oyer and Terminer and Gaol Delivery to hold sittings in Middlesex during term: (25 Geo. 3, c. 18, and 32 Geo. 3, c. 48.) Again, reliance is placed upon the supposed doctrine that a subsequent commission determines or suspends a former one of the same nature; but suspension is out of the question. If the older authorities are strictly correct, the former commission is not suspended, but absolutely determined

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by the subsequent one (Bro. Abr. "Commission," pl. 6; *Lacey's case*, 1 Leon. 270); and the plaintiff in error must contend that after every circuit a new commission of the peace ought to be issued. The truth is, that the whole matter depends upon the will of the Sovereign. If the will of the Sovereign is in any manner evinced that the former commission should be determined, that is sufficient to determine it; but if no such intention is expressed or implied, the mere issuing of a second commission is not alone sufficient to put an end to the former one,—*à fortiori*, if a contrary intention is expressed or implied. In regard to the present question there is abundant evidence, indeed it would not be questioned that the will of the Sovereign in issuing the temporary commissions of Oyer and Terminer and Gaol Delivery to the judges of assize is not thereby to determine or even suspend the permanent commission of the peace. So far was the doctrine carried in the old books that a new commission is even said to determine a prior one, with which it at all came into conflict (Marrow cited in Bro. Abr. "Commission," 7); but if that doctrine existed now, not only would the authority of justices of the peace in Quarter Sessions be determined by the commissions issued to the judges, but all their powers would cease; for their statutory powers would fall with the determination of the commission. If once destroyed, they could only be restored by the crown; and, indeed, if only suspended, how could that suspension be taken off except by the expression of the royal will. In either case a writ in the nature of a *procedendo* would be necessary, but no such writ was ever heard of. Except the sitting in Quarter Sessions, all the other powers of justices have for centuries been exercised during the holding of the assizes precisely as at any other time. It is therefore now settled by the inveterate practice of centuries, that the issuing of a new commission does not determine former commissions of the same nature, except under circumstances which demonstrate that such was the intention of the Sovereign. But the very commission of the peace completely destroys the argument on the other side; for it requires the justices in grave matters of doubt to apply for advice and assistance to the judges of assize. How could they avail themselves of that assistance if their commission was determined by the issuing of the commission under which the judges of assize sit? [LORD DENMAN, C. J.—You say that it would be the judgment of the judges and not of the justices, if the commission of the latter was at an end.] Certainly. *Lacey's case* (1 Leon. 270), is very unintelligible. It does not appear how the commissions were conflicting. [PATTESON, J.—The judges are included in the commission of the peace; but they do nothing under that commission.] In Ryland's Cr. Circ. Comp. p. 1, five separate commissions are named as those under which the judges sit,—one a commission of the peace. (He also referred to 3 Blac. Com. c. 14 (18th edit.); 2 Hale P. C. 25.) [PATTESON, J.—There is a mistake in Blackstone in one respect. He mentions a commission of Nisi Prius, but there is no such thing.

The judges try causes under the *Nisi Prius* clause in the *venire*.] *Lord Sanchar's case* (9 Rep. 118, b.) is mainly relied upon; but so far as it proceeded on the maxim *in presentia majoris cessat potestas minoris*, it is inapplicable; for the judges and the justices are both Commissioners of Oyer and Terminer; and in the assignment of error it is only said that a session of Oyer and Terminer and Gaol Delivery was being held,—not explaining what gaols were to be delivered, or what was the extent of the commissioners' jurisdiction,—nor even showing that the commission was subsequent to that of the recorder. It may be mentioned that in *Burn's Justice* there is no allusion to the doctrine now contended for. [PATTESON, J.—It would be very unseemly if the justices could come on the same day as the judges and say “we will deliver the gaol.”] Thence, no doubt, the notion has arisen, but it does not follow that the thing is illegal. The statute 4 & 5 Will. 4, cannot be very much relied upon; for it only enables the justices to alter the time of holding their sessions,—it does not require them to do so; and the statute does not appear to have been necessary, after the case of *R. v. The Justices of Leicester* (7 B. & C. 6), which decided that the earlier provisions as to the time of holding sessions were directory only. The present question, however, arises as to the jurisdiction of a recorder, which certainly stands upon a different footing from that of county justices. The powers of a recorder are conferred by statute (5 & 6 Will. 4, c. 76); and he holds office during good behaviour, whereas the county justices may be removed from the commission at any moment according to the pleasure of the Lord Chancellor. No commission is issued to a recorder, but he is appointed under the sign manual; and although the statute says that he is to have all the powers of county justices in Quarter Sessions, that is merely a compendious mode of describing his duties. It does not affect the tenure of his office, which is such that it cannot be destroyed even for a time. [PATTESON, J.—That argument pushed a little further would amount to this—that under the general commission for a county, the judges could not deliver a borough gaol.] No; the crown does not, by its charter, preclude itself from creating a concurrent tribunal. For that purpose a non-intromittant clause would be necessary; and there is no instance of a charter ousting the jurisdiction of the superior courts. [LORD DENMAN, C. J.—I recollect that in 1831 there was some doubt, in consequence of the large powers conferred by the Bristol charter, whether the Queen could issue a special commission to that place; but it was a very passing doubt.] That power is not questioned now; but it is submitted that there is a distinction between the case of a recorder and that of the county justices in Quarter Sessions.

Hodges, in reply.—That the Commissioners of Oyer and Terminer and Gaol Delivery are superior in authority to the Court of Quarter Sessions is clear from 4 Inst. 163, which shows that those commissions must be directed to the judges; as well as from that clause in the commission of the peace which refers the

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justices to the judges of assize for assistance in cases of difficulty. [PATTESON, J.—How are the justices to give judgment in the presence of one of the judges?] Practically that direction is not acted upon, but it shows the relative authority of the two tribunals. It is said that the law knows nothing of suspension; but that was the effect of the Queen's Bench coming into a county. It suspended but did not determine other jurisdictions (4 Blac. Com. 266, note by Coleridge), and no *procedendo* was necessary. The record does not state that Manchester is a borough having a separate Court of Quarter Sessions under the Municipal Act, so that the argument founded upon that statute fails. There are boroughs which still have Courts of Quarter Sessions, though not under the Municipal Act, and those courts cannot try felonies. The jurisdiction of the recorder, therefore, to try does not appear at all in this case. (He referred to ss. 103, 104, 105 of the 5 & 6 Will. 4, c. 76, and to 4 Inst. 184.)

Cur. adv. vult.

December 18, 1848.

LORD DENMAN, C. J., stated that, as only two judges had heard the former argument, the court wished the case to be re-argued.

January 24 and 25, 1849.

The second argument now took place before Lord Denman, C. J. Patteson, J., Coleridge, J., and Wightman, J.

Second argu-
ment for the
plaintiff in
error.

Hodges, for the plaintiff in error.—It clearly appears upon the record that the plaintiff was in a gaol which the judges were commissioned to deliver; and, *in nullo est erratum*, admits the facts (*Sheepshanks v. Lucas*, 1 Burr. 410); but it is to be said that the objection now taken is not a ground of error, and should have been made the subject of a plea to the jurisdiction; but first, a prisoner cannot be deprived of his right to reverse a judgment given without jurisdiction because he has omitted to plead in abatement: (3 Inst. 212, 231; 2 Hale P. C. 221, 243, 251; 2 Hawk. P. C. c. 50, ss. 2, 3; 4 Blac. Com. 390, n. (Col. ed.); *R. v. Carile*, 2 B. & Ad. 362.) It is so even in civil cases, and, *à fortiori*, therefore in criminal: (*Cox v. Gray*, 1 Bulstr. 207; *Butts v. Jennings*, 1 Bulstr. 206; Tidd's Pract. 1168 (9th ed.); *Newton v. Banks*, 17 L. J. 137, Q. B.) Secondly. These assignments of error do not contradict the record: (Bac. Abr. "Error," K. 3.) The recorder does not show, upon the face of the record, that he had jurisdiction to try, even if his jurisdiction to hold the sessions sufficiently appears. Before the trial his authority might have been suspended; but it does not even appear that there has been any grant by the crown of a separate Court of Quarter Sessions to Manchester, or any appointment of a recorder, and Manchester is not included in either of the schedules to the Municipal Corporations Act (5 & 6 Will. 4, c. 76); by sect. 107 of which the power to try felonies was taken away from

all corporate officers or justices in boroughs. (He referred to 5 & 6 Vict. c. 111.) Any objection in point of law appearing on the record, and stated in the points for argument, is open to the plaintiff (*Bruce v. Wait*, 1 M. & G. 1); and a wrong caption is a ground of error: (*R. v. Marsh*, 6 Ad. & Ell. 243.) (He also referred to *Lord Cornwallis v. Hoyle*, Fortesc. 373; *Penson v. Knight*, 2 Bulstr. 93; *Foster C. L. 3*.) [LORD DENMAN, C. J.—When we directed a second argument, we meant upon the main point then argued before us; not upon new matters, quite independent of it.] Then, as to the main question that the recorder had no jurisdiction during the assizes, it is no new doctrine, for it was stated by Lambard (Eiren. lib. 1, c. 3) 230 years ago, and has been acted upon ever since. The commissions issued to the judges of assize suspend the authority of the inferior Court of Quarter Sessions. The judges are required to deliver the gaol (*Wetherell's case*, 1 Russ. & Ry. 381; *ib.* 173); and the precept to the sheriff not only requires him to have all the prisoners before the judges, but to summon the justices to attend them; so that the recorder ought himself to be in attendance upon the judges. It does not depend upon the supposition that the Queen is always present in the Court of Queen's Bench; because the same effect of suspending inferior authorities attached to the Commissioners in Eyre: (1 Reeve E. L. 52; *Mad. Hist. Exch.* 83.) All courts equally derive their authority from the crown, which is the fountain of justice: (1 Blac. Com. 266; 3 Blac. Com. 23.) [LORD DENMAN, C. J., referred to 2 & 3 Ph. & Mary, c. 18.] It does not apply to counties or to Commissioners of Oyer and Terminer: (4 Inst. 165. Stat. 11 Hen. 6, c. 6, and 1 Edw. 6, c. 7, s. 6, were also referred to.)

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Welsby, for the crown.—The Court of Quarter Sessions does not sit under any commission of Oyer and Terminer (2 Hale P. C. 23, 42), and there is no authority for saying that a general commission of Oyer and Terminer determines a previous commission of the peace. A commission of Gaol Delivery does not supersede a commission of Oyer and Terminer; and *vice versa*: (*Bro. Abr. "Commission,"* 24.) [WIGHTMAN, J.—The recorder has a commission of Oyer and Terminer.] Not properly so called. One *assignavimus* of the commission of the peace gives authority to hear and determine certain things; but it does not make justices under that commission justices of Oyer and Terminer in the sense in which that term is used in the books: (2 Hale P. C. 21.) By the 2 & 3 Ph. & M. c. 18, the commission of Gaol Delivery for the whole county would not supersede the recorder's authority. [WIGHTMAN, J.—The prisoner appears to have been in a county gaol, not a borough gaol.] It is incorrect to say that the recorder's jurisdiction is inferior to that of the justices of assize. The justices of assize are not necessarily judges of the superior courts, and the jurisdiction of the sessions formerly was very large: (*Com. Dig. Just. Peace*, B. 3.) [COLERIDGE, J.—Suppose that the Court of Quarter Sessions is actually delivering the gaol, when the judges come, can the sessions insist upon going on? Whom is the sheriff

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to obey?] They may act concurrently. Hale (vol. 2, p. 25), mentions the various modes of determining commissions, but says nothing about suspensions. The argument is still stronger in the case of a recorder. Stat. 7 & 8 Vict. c. 30, shows that Manchester has a grant of a separate Court of Quarter Sessions; and then the authority of the recorder appears from the Municipal Act. (He referred to ss. 98, 101, 103, 105, 111, of 5 & 6 Will. 4, c. 76.) Lastly, this is not matter for error at all. There should have been a plea to the jurisdiction, and then, if there had been a wrong decision, error might have been brought upon that judgment: (*R. v. Fearnley*, 1 T. R. 316; *R. v. Johnson*, 6 East, 583; *Whistler v. Lee*, Cro. Jac. 359; 2 Bulstr. 243; *Andrews v. Linton*, 2 Ld. Raym. 585; *Molins v. Wheatley*, 1 Lev. 76; Sid. 94.)

Hodges, in reply.

Cur. adv. vult.

JUDGMENT.

Judgment.

COLERIDGE, J., now delivered the judgment of the court (after stating the facts).—The question, assuming it to be properly raised by the assignment of error, is this, whether the authority of the recorder was determined or suspended by the coming of the judges into the county, and acting under their commissions. The Recorder of Manchester derives his authority from a grant of the crown, under the provisions of the 5 & 6 Will. 4, c. 76, and by the 105th section of that act recorders are directed to hold sessions of the peace, and “have cognizance of all crimes, offences, and matters whatsoever cognizable by any Court of Quarter Sessions of the Peace for counties in England;” so that the same question which is raised on the present indictment would seem to be applicable to the jurisdiction of county sessions under similar circumstances. Distinctions were, indeed, taken in the course of the argument between recorders and justices in county sessions, arising from the mode of their appointment and the tenure of their office, and other matters. We do not, however, think it necessary further to advert to these distinctions, but rather to determine this question on broad grounds, applicable alike to all courts of sessions of the peace. On the part of the prisoner, the arguments to show that the recorder’s jurisdiction was suspended or determined, rest on two grounds. First, that the Court of Oyer and Terminer and General Gaol Delivery, before the judges, is a superior court to that of the sessions of the peace, and, therefore, that the jurisdiction of the latter must cease by analogy to the admitted effect of the Court of Queen’s Bench coming into and holding its term in any county, and to the supposed effect of justices in Eyre coming into any county. Secondly, that by the grant of subsequent commissions of Oyer and Terminer and General Gaol Delivery, the crown had determined or suspended the jurisdiction of the court of sessions of the peace. With respect to the first ground, it is plain that the principle upon which the coming of the Court of Queen’s Bench into any county is held to suspend, not to determine (see 25 Geo. 3, c. 18) other authorities, is this: “In

presentiâ majoris cessat potestas minoris," as is laid down in *Lord Sanchar's case* (9 Co. Rep. 118.) The Court of Queen's Bench is stated in all our books to be the highest court of ordinary justice in criminal cases, to which a writ of error lies from other criminal courts; and it is to that supremacy, which no other court has, that the effect of its coming into any county is to be attributed. Whether the justices in Eyre had any such superiority, so as to produce the same effect, may be doubted. The same reason does not apply; and the passages in the 4th Inst. (p. 185,) and in Bro. Abr. "Jurisdiction," pl. 116, are not very satisfactory on the point, and it is in no way material to the present inquiry, unless justices under commissions of Assize, Oyer and Terminer, and General Gaol Delivery, have in all respects the same authority as justices in Eyre had, which is nowhere distinctly laid down. The justices under such commissions are, indeed, in some sense, a court superior to that of the sessions of the peace; they have larger jurisdiction; and the justices of the peace, are by their commission, directed to consult them in weighty matters, and are also required to attend them at the holding of the assizes, popularly so called. But the judges of assize, &c., are not a court of error or superior court, like the Court of Queen's Bench, so as to come, with reference to the court of sessions of the peace, within the principle, in *presentiâ majoris cessat potestas minoris*. The first ground of the argument, on the part of the prisoner, therefore fails. With respect to the second ground, it is quite true that the granting by the crown of a subsequent commission determines altogether a prior commission of the same nature. This appears from various authorities, and from the 2 & 3 Ph. & M. c. 18, s. 2, which provides that commissions of the peace and Gaol Delivery for any town corporate, not being a county in itself, shall stand, notwithstanding the granting of any subsequent similar commission to justices of the peace for the shire. "But a commission of one nature doth not supersede a commission of another nature, as, a commission of Oyer and Terminer is not repealed by a subsequent commission of Gaol Delivery or of the peace, nor *è converso*; for they are of several natures:" (2 Hale P. C. 26; citing 3 Mar. 1; Bro. Ab. "Commission," 24.) There is also this other passage, cited from Brooke, in Hale P. C. (vol. 2, p. 47): "Though this be not a commission of Oyer and Terminer, yet by the opinion of Brooke, ("Commission," 8,) a commission of Oyer and Terminer in the county determines the *assignavimus* of the commission of the peace *ad audiendum et terminandum, quod quære*:" so that Lord Hale doubts the authority. Now the commissions of Oyer and Terminer and General Gaol Delivery from time to time directed by the crown to the judges and others, are not in their nature similar to the commissions of the peace under which courts of sessions are held. It is true that the latter contain a power to hear and determine, among many other powers, which are not included in the former; but the commissions of the peace are permanent, intended to continue during the king's reign, unless new commissions of the peace of precisely the

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same nature are issued ; whereas those of Oyer and Terminer and General Gaol Delivery are intended only for particular occasions, and in their very nature limited in duration. If the commission of Oyer and Terminer operates at all on the commissions of the peace, it must do so, not by way of suspension, for which no authority is shown, but by way of determination of so much of the commission of the peace as gives power to hear and determine—an operation which would be most inconvenient, and which has never been supposed to prevail ; for it would require new commissions of the peace to be issued after every assize—a thing never heard of or alluded to in our books. The commission of Gaol Delivery cannot operate by way of determination, because the commission of the peace does not assign the justices to deliver the gaol ; and so there is no authority in the justices to be determined by such commission. Neither, for the same reason, can it operate by way of suspension. The truth seems to be that, from the fact of the sessions of the peace not being held during the assizes, for reasons of convenience, a common notion has prevailed that they cannot by law be so held ; for which notion we cannot find any other sufficient reason. Doubtless the assizes interfere sometimes, in point of time, with the holding of the sessions ; and, therefore, 4 & 5 Will. 4, c. 47, was passed to authorize the appointment of some other time for holding the quarter sessions usually held at Easter. But this may have been for the sake of convenience, without implying that there arose any conflict of legal authority. It is true that the commission of gaol delivery commands the judges to deliver the gaol of the prisoners therein being, and it therefore gives them an authority which might, in fact, conflict with the justices in sessions trying the prisoners in the gaol under their commission of the peace. It does not, however, appear that there is any law or rule of law at present which ousts them of their jurisdiction ; and it is with the strict law alone that we have at present to deal. We are, therefore, brought to the conclusion that the writ of error cannot be supported, and that our judgment must be for the crown. But, although we are of opinion that there was no defect of jurisdiction, nor, indeed, on a consideration of all the circumstances, any inconvenience in holding the sessions, at which the plaintiff in error was convicted, during the time of the assizes (for in this respect there may be an obvious distinction between a recorder and the magistrates of a county), yet we cannot dismiss this case without expressing our opinion, that it would be highly inconvenient and improper, generally speaking, for the magistrates of a county to hold their sessions concurrently with the assizes, even in a different part of the county ; of course we cannot anticipate that they would hold them concurrently at the same place.

Judgment affirmed.

CENTRAL CRIMINAL COURT.

AUGUST SESSION.

August 25, 1849.

(Before ERLE, J.)

REG. v. HANSILL. (a)

*Accessory after the fact—Trial—11 & 12 Vict. c. 46, s. 2.**Accessory after the fact indicted in the ordinary way with the principal felon, may, since the 11 & 12 Vict. c. 46, s. 2, be tried before the principal.**Where an accessory after the fact to a charge of sending threatening letters, is tried in the absence of the principal, the letters so written and sent by the principal are evidence on the trial.**A. writes letters demanding money, with menaces, and then B. inserts letters and articles in a paper to assist A. in obtaining the money which A. had so demanded:**Where, whether B. is an accessory after the fact to A.'s felonious act.*THE indictment charged that Sarah Mills knowingly and Indictment.

feloniously did send certain letters to one Henry Bevan, demanding money, with menaces, from the said Henry Bevan, without any reasonable or probable cause, and that Martin Hansill, knowing that the said Sarah Mills had committed the said felony, did feloniously receive, harbour, maintain and assist the said Sarah Mills, against the form of the statute, &c.

The prisoner Hansill was now put upon his trial, Sarah Mills having been tried.

Before the jury were charged—

Carr and Thompson, for the prisoner, submitted that the court had no jurisdiction to try the prisoner, the principal not being tried with him, nor having been convicted of the alleged felony. There was no count in the indictment charging a substantive felony.

The recent stat. 11 & 12 Vict. c. 46, s. 2, enacts that, "from and after the passing of this act, if any person shall become an accessory after the fact to any felony, whether the same be a felony at common Law, or by virtue of any statute or statutes made or to be made, he may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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shall not be amenable to justice," &c. The only alteration contemplated by the statute is, that if an accessory is indicted for a substantive felony, he may be tried before and in the absence of the principal felon. He might have been so indicted here, but he has not been, for the indictment is in the ordinary form, charging him as an accessory in the same way as he would have been charged before that act. [ERLE, J.—I do not think there is anything in the objection. It appears to me that the words of the statute "may be indicted and convicted of a substantive felony" must mean that an accessory after the fact may be tried at any time. The statute was only intended to alter the course of trial—not to alter the law as to the crime itself, nor the mode of describing it. *R. v. Caspar* (9 C. & P. 289; M. C. C. 101) seems to confirm this view of the case. I am not aware that this offence could be properly described without stating that the principal had committed the felony. My opinion is clearly against you, but the point with reference to the statute is a new and important one, and I will reserve it if it become necessary.]

Ballantine, and *Huddleston*, for the prosecution, tendered in evidence the letters of Sarah Mills, in which the demand of money was made.

Parry objected to their reception. They would be admissible against Mills, if she was on her trial, but they were no more than admissions made by her, and the admissions of a principal were not evidence against an accessory: (*Russell on Crimes*, 42.) In *R. v. Pym* (1 Cox's Cr. Cas. 339) before Erle, J., it was held that the letters of the principal were not evidence against the accessory.

ERLE, J.—The rule is quite clear, that the statements or confessions of a principal are not evidence against the accessory. But it is necessary here to prove a demand of money, and these letters constitute the demand. They are, therefore, evidence of acts done. It would have been very different if they had been mere written statements made by Mills that she had made a demand. They could not then be admitted as against this prisoner.

The letters were then read, and contained threats of exposing the immorality of the prosecutor, unless her (Mills) demands of money were complied with. In one of them, the writer said, "I write to tell you of my fixed intention, which is, to insert a paragraph in a Sunday journal, a satirical paper, in which your name shall conspicuously and unmistakeably figure, and unless I hear from you by the Saturday in this week, or the Saturday in next, your name will appear," &c.

It was then proved that immediately afterwards articles reflecting on the prosecutor appeared in the *Satirist* newspaper, of which the prisoner was the proprietor. The prisoner was afterwards seen by the attorney for the prosecution, and was cautioned by him as to the course he was pursuing, but the prisoner said that he could not stop the publication of such articles or future ones, and referred the witness to Miss Mills, giving her address at 18, Upper Montague-street, where she was afterwards seen.

The prisoner, on the witness telling him that the prosecutor would submit to a little extortion rather than have his character assailed, consented at length to wait a week that the prosecutor might be spoken to on the subject. Notices, however, that further articles of the same nature would shortly be published in the *Satirist*, continued to appear in that paper.

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At the close of the case for the prosecution,

Parry submitted that there was no evidence to convict *Hansill* of being an accessory. In Archbold Crim. P. 8, it is said, "An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon, whether he be a principal or an accessory before the fact merely." Again, "any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessory after the fact." In *R. v. Chapple* (9 C. & P. 355), the Recorder, after consulting Mr. Justice Littledale, held that, in order to support a charge of receiving, harbouring, comforting, assisting, and maintaining a felon, there must be some act proved to have been done to assist the felon personally. It was not enough to prove possession of various sums of money derived from the disposal of the property stolen. Here the principal felony is the demanding money, with menaces, and nothing appears to have been done by the prisoner which can come within any of the terms mentioned in the definition of an accessory after the fact.

Ballantine, and *Huddleston*, contended that *R. v. Chapple* was no authority for the position sought to be maintained. There was there a reception of the proceeds of the stolen goods, but not of the goods themselves. No assistance was, therefore, rendered to the felon. At common law the receipt of stolen goods made the receiver an accessory after the fact: (2 Russ. 247, citing Hale's Pleas of the Crown.)

Parry observed that Hale himself (vol. i, p. 620) said exactly the reverse, viz., that the receipt of stolen goods did not at common law constitute the receiver an accessory, but was a distinct misdemeanor punishable by fine and imprisonment, and Archbold adopted that statement.

ERLE, J.—It appears to me that the distinction intended by Hale is that you cannot make a man an accessory from a bare receiving; there must be such a receiving as tends to assist the felon.

Ballantine submitted that any assistance given to the principal felon, to enable her to carry out the object with which the felony was committed, was sufficient to make the defendant an accessory after the fact. [ERLE, J.—I do not agree to that proposition; the assistance must be such as would tend to prevent the principal felon from being brought to justice. The question is, did he, after the felony was complete, assist the felon to elude justice? It is no part of this felony that the money should be paid. The crime is complete as soon as the demand is made. Can it be said, then, that, by assisting in a

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fresh attempt to obtain money, he aided her in concealing or even in carrying out the one completed. If one man murders another with the object of marrying the widow, does a third person afterwards become accessory to the murder by advising or by assisting the murderer to effect his intended marriage?]

Huddleston.—Any aid afforded to a felon is sufficient to make the aider an accessory after the fact. Here Mills demands money, and her object is to extort it by the threats she uses; the prisoner assists her, and the question for the jury will be whether, looking to the whole of the evidence, his object was not to prevent her conduct being treated as felonious, and to induce the prosecutor to pay money rather than that the matter should be made public.

Parry submitted, that in that view it might be contended that a man in furthering the object of a criminal act was in truth trying to conceal it. If the defendant was actively impeding the prosecution of the principal, he would doubtless be guilty, but merely because that which he did with another purpose might have the effect of inducing the prosecutor to pay money rather than have a charge of immorality made against him; surely, it could not be said that he was seeking to save the principal from prosecution. Mere passive impediment to the course of justice would not make a man an accessory; as suffering a felon to escape or agreeing not to give evidence against him: (1 Hale, 619, 620.)

ERLE, J.—The matter is no doubt one of great importance. It is the duty of all men to bring felons to justice, and, although the neglect of such duty will not render a person an accessory, yet any act impeding or tending to impede the course of justice will make him so. I shall leave the case to the jury to say, whether, at the time the defendant acted in the matter, he knew that Mills had committed a felony; and in the event of a verdict against the defendant on that point, the other facts may be found specially, and the various points of law reserved for further consideration.

On the question of knowledge so left to the jury, they found the defendant

Not Guilty.

Ballantine, and *Huddleston*, for the prosecution.

Parry, and *Thompson*, for the defence.

APPENDIX.

STATUTES AND PARTS OF STATUTES

AFFECTING THE CRIMINAL LAW PASSED IN THE SESSION OF
PARLIAMENT OF 1848.

CRIMINAL LAW ADMINISTRATION.

11 & 12 VICT. CAP. 66.

An Act for the Removal of Defects in the Administration of Criminal Justice.—[14th August, 1848.]

WHEREAS the technical strictness of criminal proceedings might in some instances be further relaxed, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence: and whereas it is expedient to make further provision for the more effectual prosecution of accessaries before and after the fact to felony: and whereas it is also expedient that any accessary before the fact to felony should be liable to be indicted, tried, convicted, and punished in all respects like the principal, as is now the case in treason and in all misdemeanors: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act, if any person shall become an accessary before the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.

11 & 12 Vict.
c. 66.
*Adm. of Crim.
Justice.*

Accessaries
before the fact
to any felony
may be punished
in the same
degree as the
principal.

11 & 12 Vict.
c. 66.

*Adm. of Crim.
Justice.*

Trial and con-
viction of acces-
saries after the
fact.

II. And whereas an accessory after the fact to felony can at present be tried only along with the principal felon, or after the principal felon has been convicted, and not otherwise, which is sometimes productive of a failure of justice; be it therefore enacted, that from and after the passing of this act, if any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, he may be indicted and convicted either as an accessory after the fact to the principal felony together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony if convicted as an accessory may be punished, and the offence of such person, howsoever indicted, may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon in the same manner as if the act by reason of which such person shall have become an accessory had been committed at the same place as the principal felony: provided always, that no person who shall be once duly tried for any such offence, whether as an accessory after the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.

As to additions
of counts in
indictments for
stealing and
receiving stolen
property.

III. And whereas, according to the present practice of courts of criminal jurisdiction, it is not permitted in an indictment for stealing property to add a count for receiving the same property knowing it to have been stolen, or in an indictment for receiving stolen property knowing it to have been stolen to add a count for stealing the same property, and justice is hereby often defeated; be it therefore enacted, that from and after the passing of this act, in every indictment for feloniously stealing property it shall be lawful to add a count for feloniously receiving the same property, knowing it to have been stolen, and in any indictment for feloniously receiving property knowing it to have been stolen it shall be lawful to add a count for feloniously stealing the same property; and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property or of receiving it knowing it to have been stolen; and if such indictment shall have been preferred and found against two or more persons it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property or of receiving it knowing it to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving it knowing it to have been stolen.

Courts of oyer
and terminer
may cause in-

IV. And whereas a failure of justice frequently takes place in criminal trials by reason of variances between writings produced

in evidence and the recital or setting forth thereof in the indictment or information, and the same cannot now be amended at the trial, except in cases of misdemeanor; for remedy thereof be it enacted, that it shall and may be lawful for any Court of Oyer and Terminer and General Gaol Delivery, if such court shall see fit so to do, to cause the indictment or information for any offence whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the court, and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared.

11 & 12 Vict.
c. 66.

*Adm. of Crim.
Justice.*

dictments to be
amended in
certain cases.

V. Provided always, and be it enacted, that nothing in this act contained shall extend to Scotland.

Not to extend
to Scotland.

VI. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of Parliament.

Act may be
amended, &c.

CRIMINAL APPEAL.

11 & 12 VICT. CAP. 78.

An Act for the further Amendment of the Administration of the Criminal Law.—[31st August, 1848.]

WHEREAS it is expedient to provide a better mode than that now in use of deciding any difficult question of law which may arise in criminal trials in any Court of Oyer and Terminer and Gaol Delivery, and to make further amendments in the administration of the criminal law; be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that when any person shall have been convicted of any treason, felony, or misdemeanor before any Court of Oyer and Terminer or Gaol Delivery, or Court of Quarter Sessions, the judge or commissioner, or justices of the peace before whom the case shall have been tried may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the Justices of either Bench and Barons of the Exchequer; and thereupon

11 & 12 Vict.
c. 78.

*Criminal
Appeal.*

Questions of
law may be
reserved at
sessions of
the peace for
consideration
of judges.

11 & 12 Vict.
c. 78.

*Criminal
Appeal.*

Questions
reserved to be
certified to the
judges.

shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and in either case the court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be.

II. And be it enacted, that the judge or commissioner or Court of Quarter Sessions shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and barons; and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such judgment and order, if any, of the said justices and barons, shall be certified under the hand of the presiding chief justice or chief baron to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry, under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule annexed to this act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge him, and also the next Court of Oyer and Terminer and Gaol Delivery or Sessions of the Peace shall vacate the recognizance of bail, if any; and if the Court of Oyer and Terminer and Gaol Delivery or Court of Quarter Sessions shall be directed to give judgment, the said court shall proceed to give judgment at the next session.

III. And be it enacted, that the jurisdiction and authorities by this act given to the said Justices of either Bench, and Barons of the Exchequer, shall and may be exercised by the said justices and barons, or five of them at the least, of whom the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or one of such chiefs at least, shall be part, being met in the Exchequer Chamber or other convenient place; and the judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the Superior Courts of Common Law at Westminster or Dublin, as the case may be, are now delivered.

11 & 12 Vict.
c. 78.

*Criminal
Appeal.*

Quorum of
judges; their
judgments to be
delivered in
open court.

IV. And be it enacted, that the said justices and barons, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended.

Case or certificate may be sent back for amendment.

V. And be it enacted, that whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition, in any criminal case, and the Court of Error shall reverse the judgment, it shall be competent for such Court of Error either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition.

When judgment is reversed on writ of error, record may be remitted to court below for judgment.

VI. And be it enacted, that every person who shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any certificate of or copy certified by a chief justice, or any certificate of or copy certified by a clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, with intent to cause any person to be discharged from custody, or otherwise prevent the due course of justice, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding ten years, or be imprisoned for any term not exceeding three years, with or without hard labour and solitary confinement, both or either, at the discretion of the court before which he shall be tried.

Penalty for forgery.

VII. And be it enacted, that this act shall not extend to Scotland.

Act not to extend to Scotland.

VIII. And be it enacted, that this act may be amended or repealed by any act to be passed during this present session of Parliament.

Act may be amended, &c.

11 & 12 Vict.
c. 78.

*Criminal
Appeal.*

SCHEDULE.

WHEREAS at the session of the peace for the county of
held on before and others their fellows, [or at
the session of oyer and terminer and gaol delivery held for the
county of on before, among others, Sir A. B.
Knight, one of the justices of the court of and
here name the quorum commissioners, Justices of
Oyer and Terminer and Gaol Delivery,] A. B., late of
labourer, having been found guilty of felony, and judgment there-
upon given that [state the substance,] the court before whom he was
tried reserved a certain question of law for the consideration of the
Justices of either Bench and the Barons of the Exchequer, and
execution was thereupon respited in the meantime:

This is to certify, that the said justices and barons having met
in the Exchequer Chamber at Westminster, [or Dublin, as the case
may be,] on the day of it was considered
by the said justices and barons there that the judgment aforesaid
should be annulled, and an entry made on the record, that the said
A. B. ought not, in the judgment of the said justices and barons,
to have been convicted of the felony aforesaid; and you are there-
fore hereby required forthwith to discharge the said A. B. from
your custody.

To the gaoler of and the sheriff of and all
others whom it may concern.

(Signed) E. F.

Clerk of the peace for the county of
[or, clerk of assize for
as the case may be].

ADMINISTRATION OF JUSTICE ACT.

11 & 12 VICT. CAP. 42.

*An Act to facilitate the performance of the Duties of Justices of the
Peace out of Sessions within England and Wales with respect to
persons charged with indictable offences.*—[14th August, 1848.]

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

WHEREAS it would conduce much to the improvement of the
administration of criminal justice within England and Wales
if the several statutes and parts of statutes relating to the duties
of Her Majesty's justices of the peace therein with respect to per-
sons charged with indictable offences were consolidated, with such
additions and alterations as may be deemed necessary, and that
such duties should be clearly defined by positive enactment: be it
therefore declared and enacted by the Queen's most excellent Ma-
jesty, by and with the advice and consent of the Lords Spiritual

and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That in all cases where a charge or complaint shall be made before any one or more of Her Majesty's justices of the peace for any county, riding, division, liberty, city, borough, or place within England or Wales, that any person has committed or is suspected to have committed any treason, felony, or indictable misdemeanor, or other indictable offence whatsoever, within the limits of the jurisdiction of such justice or justices of the peace, or that any person guilty or suspected to be guilty of having committed any such crime or offence elsewhere out of the jurisdiction of such justice or justices is residing or being or is suspected to reside or be within the limits of the jurisdiction of such justice or justices, then and in every such case, if the person so charged or complained against shall not then be in custody, it shall be lawful for such justice or justices of the peace to issue his or their warrant to apprehend such person, and to cause him to be brought before such justice or justices, or any other justice or justices for the same county, riding, division, liberty, city, borough, or place, to answer to such charge or complaint, and to be further dealt with according to law: provided always, that in all cases it shall be lawful for such justice or justices to whom such charge or complaint shall be preferred, if he or they shall so think fit, instead of issuing in the first instance his or their warrant to apprehend the person so charged or complained against, to issue his or their summons directed to such person, requiring him to appear before the said justice or justices at a time and place to be therein mentioned, or before such other justice or justices of the same county, riding, division, liberty, city, borough, or place, as may then be there, and if after being served with such summons in manner hereinafter mentioned he shall fail to appear at such time and place, in obedience to such summons, then and in every such case the said justice or justices, or any other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, may issue his or their warrant to apprehend such person so charged or complained against, and cause such person to be brought before him or them, or before some other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, to answer to the said charge or complaint, and to be further dealt with according to law; provided nevertheless, that nothing herein contained shall prevent any justice or justices of the peace from issuing the warrant hereinbefore first mentioned at any time before or after the time mentioned in such summons for the appearance of the said accused party.

II. And be it enacted, that in all cases of indictable crimes or offences of any kind or nature whatsoever committed on the high seas, or in any creek, harbour, haven, or other place in which the Admiralty of England have or claim to have jurisdiction, and in all cases of crimes or offences committed on land beyond the seas, or which an indictment may legally be preferred in any place

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

For what offences a justice of the peace may grant a warrant or summons to cause a person charged therewith to be brought before him.

In what cases the party may be summoned instead of issuing a warrant in the first instance.

If the summons be not obeyed, then a warrant may be issued.

Warrant to apprehend for offences committed on the high seas or abroad.

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

Warrant to
apprehend a
party against
whom an indict-
ment is found.

If person
indicted be
already in
prison for some
other offence,
justice may
order him to be
detained until
removed by writ
of habeas.

within England or Wales, it shall be lawful for any one or more of Her Majesty's justices of the peace for any county, riding, division, liberty, city, borough, or place within England or Wales in which any person charged with having committed or with being suspected to have committed any such crime or offence shall reside or be, or shall be supposed or suspected to reside or be, to issue his or their warrant to apprehend the person so charged and to cause him to be brought before him or them, or some other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, to answer to the said charges, and to be further dealt with according to law.

III. And be it enacted, that where any indictment shall be found by the grand jury in any Court of Oyer and Terminer or General Gaol Delivery, or in any Court of General or Quarter Sessions of the Peace, against any person who shall then be at large, and whether such person shall have been bound by any recognizance to appear to answer to the same or not, the person who shall act as clerk of the indictments at such Court of Oyer and Terminer or Gaol Delivery, or as clerk of the peace at such Sessions, at which the said indictment shall be found, shall at any time afterwards, after the end of the Sessions of Oyer and Terminer or Gaol Delivery or Sessions of the Peace at which such indictment shall have been found, upon application of the prosecutor, or of any person on his behalf, and on payment of a fee of one shilling, if such person shall not have already appeared and pleaded to such indictment, grant unto such prosecutor or person a certificate of such indictment having been found; and upon production of such certificate to any justice or justices of the peace for any county, riding, division, liberty, city, borough, or place in which the offence shall in such indictment be alleged to have been committed, or in which the person indicted in and by such indictment shall reside or be, or be supposed or suspected to reside or be, it shall be lawful for such justice or justices, and he and they are hereby required, to issue his or their warrant to apprehend such person so indicted, and to cause him to be brought before such justice or justices, or any other justice or justices for the same county, riding, division, liberty, city, borough, or place, to be dealt with according to law, and afterwards, if such person be thereupon apprehended and brought before any such justice or justices, such justice or justices, upon its being proved upon oath or affirmation before him or them that the person so apprehended is the same person who is charged and named in such indictment, shall, without further inquiry or examination, commit him for trial, or admit him to bail, in manner hereinafter mentioned; or if such person so indicted shall be confined in any gaol or prison for any other offence than that charged in the said indictment, at the time of such application, and production of the said certificate to such justice or justices as aforesaid, it shall be lawful for such justice or justices and he and they are hereby required, upon it being proved before him or them upon oath or

affirmation that the person so indicted and the person so confined in prison are one and the same person, to issue his or their warrant directed to the gaoler or keeper of the gaol or prison in which the person so indicted shall then be confined as aforesaid, commanding him to detain such person in his custody until by Her Majesty's writ of *habeas corpus* he shall be removed therefrom, or the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of his custody by the due course of law.

11 & 12 Vict.
c. 42.

Adm.
of Justice.

IV. And be it enacted, that it shall be lawful for any justice or justices of the peace to grant or issue any warrant as aforesaid or any search warrant on a Sunday as well as on any other day.

Power to justice
to issue warrants
on Sundays.

V. And be it enacted, that in cases where a justice of the peace for any county, riding, division, liberty, city, borough, or place, shall be also justice of the peace for a county, riding, division, liberty, city, borough, or place next adjoining thereto or surrounded thereby, it shall and may be lawful for such justice of the peace to act as such justice for the one county, riding, division, liberty, city, borough, or other place, whilst he is residing or happens to be in the other such county, riding, division, liberty, city, borough, or other place, in all matters and things hereinbefore or hereafter in this Act mentioned; and that all such acts of such justice, and the acts of any constable or other officer in obedience hereto, shall be as valid, good, and effectual in the law to all intents and purposes as if such justice at the time he shall so act as aforesaid were in the county, riding, division, liberty, city, borough, or other place for which he shall so act; and all constables and other officers for the county, riding, division, liberty, city, borough, or place for which such justice shall so act as aforesaid be hereby authorized and required to obey the warrants, orders, directions, act or acts of such justice which in that behalf shall be granted, given, or done, and to do and perform their several offices and duties in respect thereof, under the pains and penalties to which any constable or other officer may be liable for a neglect of duty; and any such constable or other peace officer, or any other person, apprehending or taking into custody any person offending against law, and whom he lawfully may and ought to apprehend or take into custody, by virtue of his office or otherwise, in any such county, riding, division, liberty, city, borough, or place, may lawfully take and convey such person so apprehended and taken as aforesaid to and before any such justice of the peace for such county, riding, division, liberty, city, borough, or place whilst such justice shall be in such adjoining county, riding, division, liberty, city, borough, or place as aforesaid, and the said constables and other peace officers, and all such other persons as aforesaid, be hereby authorized and required in all such cases so to act in all things as if the said justice of the peace were within the said county, riding, division, liberty, city, borough, or place for which he shall so act.

Justices for
adjoining coun-
ties, &c. may
act as such for
one county, &c.
while residing
in another.

All acts of
justice, &c. to
be valid.

Constables, &c.
apprehending
offenders in one
such county,
&c. may take
them before
such justice in
the adjoining
county, &c., if
he act as a
justice in both.

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

Justices for a
county, &c. may
act for it in an
adjoining city
or place of
exclusive
jurisdiction.

Not to give
power to act,
&c. in any
matters, &c.
arising within
the same.

For removal of
doubts as to
powers given to
justices, &c., in
detached parts
of counties,
under 2 & 3
Vict. c. 82.

When charge,
&c. is made, if
a warrant is to
be issued,
information,
&c. on oath, to
be laid before
justices.

If summonses to
be issued
instead, infor-
mation, &c. not
necessary to be
on oath.

No objection
allowed for
alleged defect
in form.

VI. And be it enacted, that it shall be lawful for any justice or justices of the peace acting for any county at large, or for any riding or division of such county, to act as such at any place within any city, town, or other precinct, being a county of itself, or otherwise having exclusive jurisdiction, and situated within, surrounded by, or adjoining to any such county, riding, or division respectively, and that all and every such act and acts, matters and things, to be so done by such justice or justices within such city, town, or precinct, as justice or justices for such county, riding, or division respectively, shall be as valid and effectual in law as if the same had been done within such county, riding, or division respectively, to all intents and purposes whatsoever: provided always, that nothing in this Act contained shall extend to give power to the justices of the peace for any county, riding, or division, not being also justices for such city, town, or other precinct, or not having authority as justices of the peace therein, or any constable or other officer acting under them, to act or intermeddle in any matters or things arising within any such city, town, or precinct, in any manner whatsoever.

VII. And whereas doubts have arisen whether the powers given to justices by an Act passed in the session of Parliament held in the second and third years of the reign of Her present Majesty, intituled *An Act for the better Administration of Justice in detached Parts of Counties*, are applicable to cases of summary jurisdiction and to acts merely ministerial: be it hereby declared and enacted, that all the acts of any justice or justices, and of any constable or officer in obedience thereto, shall be as good in relation to any detached part of any county which is surrounded in whole or in part by the county for which such justice or justices acts or act as if the same were to all intents and purposes part of the said county; and all constables and other officers of such detached part are hereby required to obey the warrants, orders, and acts of such justice or justices, and to perform their several duties in respect thereof, under the pains and penalties to which any constable or other officer may be liable for a neglect of duty.

VIII. And be it enacted, that in all cases where a charge or complaint for any indictable offence shall be made before such justice or justices as aforesaid, if it be intended to issue a warrant in the first instance against the party or parties so charged, an information and complaint thereof in writing, on the oath or affirmation of the informant or of some witness or witnesses in that behalf, shall be laid before such justice or justices: provided always, that in all cases where it is intended to issue a summons instead of a warrant in the first instance, it shall not be necessary that such information and complaint shall be in writing, or be sworn to or affirmed in manner aforesaid, but in every such case such information and complaint may be by parol merely, and without any oath or affirmation whatsoever to support or substantiate the same: provided also, that no objection shall be taken

or allowed to any such information or complaint for any alleged defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justice or justices who shall take the examination of the witnesses in that behalf, as hereinafter mentioned.

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

IX. And be it enacted, that upon such information and complaint being so laid as aforesaid the justice or justices receiving the same may, if he or they shall think fit, issue his or their summons or warrant respectively as hereinbefore is directed to cause the person charged as aforesaid to be and appear before him or them, or any other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, to be dealt with according to law; and every such summons shall be directed to the party so charged in and by such information, and shall state shortly the matter of such information, and shall require the party to whom it is so directed to be and appear at a certain time and place therein mentioned before the justice who shall issue such summons, or before such other justice or justices of the peace of the same county, riding, division, liberty, city, borough, or place as may then be there, to answer to the said charge, and to be further dealt with according to law; and every such summons shall be served by a constable or other peace officer upon the person to whom it is so directed by delivering the same to the party personally, or if he cannot conveniently be met with then by leaving the same with some person for him at his last or most usual place of abode; and the constable or other peace officer who shall have served the same in manner aforesaid shall attend at the time and place and before the justices in the said summons mentioned, to depose, if necessary, to the service of such summons; and if the person so served shall not be and appear before the justice or justices at the time and place mentioned in such summons, in obedience to the same, then it shall be lawful for such justice or justices to issue his or their warrant for apprehending the party so summoned, and bringing him before such justice or justices, or some other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, to answer the charge in the said information and complaint mentioned, and to be further dealt with according to law: provided always, that no objection shall be taken or allowed to any such summons or warrant for any alleged defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justice or justices who shall take the examinations of the witnesses in that behalf, as hereinafter mentioned; but if any such variance shall appear to such justice or justices to be such that the party charged has been thereby deceived or misled, it shall be lawful for such justice or justices, at the request of the party so charged, to adjourn the hearing of the case to some future day, and in the meantime to remand the party so charged, or admit him to bail, in manner hereinafter mentioned.

Upon complaint being laid, justices receiving the same may issue summons or warrant for appearance of person charged.

How summons to be served.

If party summoned do not attend justice may issue a warrant to compel attendance.

No objection allowed for alleged defect in form, &c.

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

Warrant to
apprehend
parties to be
under hand and
seal of justice.

How warrant to
be directed,
and to whom.

How and where
warrant may be
executed.

No objection
allowed for
alleged defect
in form, &c.

X. And be it declared and enacted, that every warrant hereafter to be issued by any justice or justices of the peace to apprehend any person charged with any indictable offence shall be under the hand and seal or hands and seals of the justice or justices issuing the same, and may be directed either to any constable or other person by name, or generally to the constable of the parish or other district within which the same is to be executed, without naming him, or to such constable and all other constables or peace officers in the county or other district within which the justice or justices issuing such warrant has or have jurisdiction, or generally to all the constables or peace officers within such last-mentioned county or district, and it shall state shortly the offence on which it is founded, and shall name or otherwise describe the offender, and it shall order the person or persons to whom it is directed to apprehend the offender, and bring him before the justice or justices issuing the said warrant, or before some other justice or justices of the peace for the same county, riding, division, liberty, borough, or place, to answer to the charge contained in the information, and to be further dealt with according to law; and it shall not be necessary to make such warrant returnable at any particular time, but the same may remain in force until it shall be executed; and such warrant may be executed by apprehending the offender at any place within the county, riding, division, liberty, city, borough, or place within which the justice or justices issuing the same shall have jurisdiction, or in case of fresh pursuit at any place in the next adjoining county or place, and within seven miles of the border of such first-mentioned county, riding, division, liberty, city, borough, or place, without having such warrant backed as hereinafter mentioned; and in all cases where such warrant shall be directed to all constables or other peace officers within the county or other district within which the justice or justices issuing the same shall have jurisdiction it shall be lawful for any constable, headborough, tithingman, borsholder, or other peace officer for any parish, township, hamlet, or place within such county or district to execute the said warrant within any parish, township, hamlet, or place situate within the jurisdiction for which such justice or justices shall have acted when he or they grant such warrant, in like manner as if such warrant were directed specially to such constable by name, and notwithstanding the place in which such warrant shall be executed shall not be within the parish, township, hamlet, or place for which he shall be such constable, headborough, tithingman, borsholder, or other peace officer provided always, that no objection shall be taken or allowed to any such warrant for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justice or justices who shall take the examinations of the witnesses in that behalf, as hereinafter mentioned; but if any such variance shall appear to such justice or justices to be such that the party charged has been thereby deceived or misled, it shall be lawful for such justice or justices,

at the request of the party so charged, to adjourn the hearing of the case to some future day, and in the meantime to remand the party so charged, or to admit him to bail, in manner hereinafter mentioned.

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

Regulations as
to the backing
of warrants.

XI. And be it enacted, that if the person against whom any such warrant shall be issued as aforesaid shall not be found within the jurisdiction of the justice or justices by whom the same shall be issued, or if he shall escape, go into, reside, or be, or be supposed or suspected to be, in any place in England or Wales out of the jurisdiction of the justice issuing such warrant, it shall and may be lawful for any justice of the peace for the county or place into which such person shall so escape or go, or in which he shall reside be, or be supposed or suspected to be, upon proof alone being made on oath of the handwriting of the justice issuing such warrant, to make an indorsement on such warrant, signed with his name, authorizing the execution of such warrant within the jurisdiction of the justice making such indorsement, and which indorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables and other peace officers of the county or place where such warrant shall be so indorsed, to execute the same in such other county or place, and to carry the same against whom such warrant shall have issued, when apprehended, before the justice and justices of the peace who first issued such warrant, or before some other justice or justices of the peace in and for the same county, riding, division, city, liberty, borough, or place, or before some justice or justices of the county, division, liberty, city, borough, or place where the offence by which the said warrant mentioned appears therein to have been committed: provided always, that if the prosecutor, or any of the witnesses upon the part of the prosecution, shall then be in the county or place where such person shall have been so apprehended, the constable or other person or persons who shall have so apprehended such person may, if so directed by the justice backing such warrant, take and convey him before the justice who shall have so indorsed the said warrant, or before some other justice or justices of the same county or place; and the said justice or justices may thereupon take the examinations of such prosecutor or witnesses, and proceed in every respect in manner hereinafter directed with respect to persons charged before a justice or justices of the peace with an offence alleged to have been committed in another county or place than that in which such persons have been apprehended.

Proviso.

XII. And be it enacted, that if any person against whom a warrant shall be issued in any county, riding, division, liberty, city, borough, or place in England and Wales, by any justice of the peace, or by any judge of Her Majesty's Court of Queen's Bench, or justice of Oyer and Terminer or Gaol Delivery, for any indictable offence against the laws of that part of the United Kingdom, shall escape, go into, reside, or be, or be supposed or suspected to

English warrants may be backed in Ireland, and vice versa in the event of parties escaping.

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

Warrants so
indorsed to be
valid.

English war-
rants may be
backed in the
Isles of Man,
Guernsey, Jer-
sey, Alderney,
or Sark, and
vice versa.

be, in any county or place in that part of the United Kingdom called Ireland, or if any person against whom a warrant shall be issued in any county or place in Ireland, by any justice of the peace, or by any judge of Her Majesty's Court of Queen's Bench there, or any justice of Oyer and Terminer or Gaol Delivery, for any crime or offence against the laws of that part of the United Kingdom, shall escape, go into, reside, or be, or be supposed or suspected to be, in any county, riding, division, liberty, city, borough, or place in that part of the United Kingdom called England or Wales, it shall and may be lawful for any justice of the peace in and for the county or place into which such person shall escape or go, or where he shall reside or be, or be supposed or suspected to be, to indorse such warrant in manner hereinbefore mentioned, or to the like effect, and which warrant so indorsed shall be a sufficient authority to the person or persons bringing such warrant, and to all persons to whom such warrant was originally directed, and also to all constables or other peace officers of the county or place where such warrant shall be so indorsed, to execute the said warrant in the county or place where the justice so indorsing it shall have jurisdiction, by apprehending the person against whom such warrant shall have been granted, and to convey him before the justice or justices who granted the same, or before some other justice or justices of the peace in and for the same county or place, and which said justice or justices before whom he shall be so brought shall thereupon proceed in such manner as if the said person had been apprehended in the said last-mentioned county or place.

XIII. And be it enacted, that if any person against whom a warrant shall be issued in any county, riding, division, liberty, city, borough, or place in England or Wales, by any justice of the peace, or by any judge of Her Majesty's Court of Queen's Bench or justices of Oyer and Terminer or Gaol Delivery, for any indictable offence, shall escape, go into, reside, or be, or be supposed or suspected to be, in any of the Isles of Man, Guernsey, Jersey, Alderney, or Sark, it shall be lawful for any officer within the district into which such accused person shall escape or go, or where he shall reside or be, or be supposed or suspected to be, who shall have jurisdiction to issue any warrant or process in the nature of a warrant for the apprehension of offenders within such district, to indorse such warrant in the manner hereinbefore mentioned, or to the like effect; or if any person against whom any warrant or process in the nature of a warrant, shall be issued in any of the isles aforesaid, shall escape, go into, reside, or be, or be supposed or suspected to be, in any county, riding, division, liberty, city, borough, or place in England or Wales, it shall be lawful for any justice of the peace in and for the county or place into which such person shall escape or go, or where he shall reside or be, or be supposed or suspected to be, to indorse such warrant or process in manner hereinbefore mentioned, and every such warrant or process, so indorsed, shall be a sufficient authority to the person or

ing the same, and to all persons to whom the same was originally directed, and also to all constables and persons in the county, district, or jurisdiction within which it or process shall be so indorsed, to execute the same in the county, district, or place where the justice or officer in the same has jurisdiction, and to convey such offender, apprehended, into the county or district wherein the justice who issued such warrant or process shall have jurisdiction to carry him before such justice or person, or before some other person within the same county or district who shall have jurisdiction to commit such offender to prison for trial, and such justice or person may thereupon proceed in such and the same manner as if the said offender had been apprehended within his

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

Warrants so
indorsed to be
valid.

and be it declared and enacted, that if any person against whom a warrant shall be issued by any justice of the peace for the county or place within England or Wales or Ireland, or by the Lord or Her Majesty's Court of Queen's Bench or justice of the Peace or Gaol Delivery in England or Ireland, for any offence against the laws of those parts respectively of the Kingdom of Great Britain and Ireland, shall escape, or be, or be supposed or suspected to be, in any part of the said United Kingdom called Scotland, it shall be lawful for the sheriff or steward depute or substitute, or any other person of the peace of the county or place where such person shall go into, reside, or be, or be supposed or suspected to be, to indorse the said warrant in manner hereinbefore mentioned to the like effect, which warrant so indorsed shall be valid to the authority to the person or persons bringing such warrant to all persons to whom such warrant was originally directed, and also to all sheriffs' officers, stewards' officers, constables, and peace officers of the county or place where such warrant was indorsed, to execute the same within the county or place in which it shall have been so indorsed, by apprehending the person next whom such warrant shall have been granted, and to carry him into the county or place in England, Wales, or Ireland wherein the justice or justices who first issued the said warrant shall have jurisdiction in that behalf, and to carry him before such justice or person before any other justice or justices of the peace of and for the county or place, to be there dealt with according to the law which said justice or justices are hereby authorized and empowered thereupon to proceed in such and the same manner as if the said offender had been apprehended within his or their juris-

English or Irish
warrants may
be backed in
Scotland.

Warrants so
indorsed to be
valid.

and be it enacted, that if any person against whom a warrant shall be issued by the Lord Justice General, Lord Chief Justice, or any of the Lords Commissioners of Justiciary, or by the Lord or Steward Depute or Substitute, or Justice of the Peace for that part of the United Kingdom of Great Britain and Ireland called Scotland, for any crime or offence against the laws

Such warrants
may be backed
in England or
Ireland.

11 & 12 Vict.
c. 42.

Justice of the Peace.

Warrant so
indorsed to be
valid.

of that part of the United Kingdom, shall escape, go into, or be, or shall be supposed or suspected to be, in any place in England or in Ireland, it shall be lawful for any justice of the peace in and for the county or place into which such person shall escape or go, or where he shall reside or be, or shall be supposed or suspected to be, to indorse the said warrant in the margin hereinafter mentioned, and which said warrant so indorsed shall be a sufficient authority to the person or persons bringing the same, and to all persons to whom the same was originally directed, and also to all constables and other peace officers of the county or place where the justice so indorsing such warrant shall have jurisdiction, to execute the said warrant in the county or place in which it is so indorsed, by apprehending the person against whom the said warrant shall have been granted, and to convey him to the county or place in Scotland next adjoining to that part of the United Kingdom called England, and carry him before the sheriff, or steward depute, or substitute, or one of the justices of the peace of such county or place, and which said sheriff, steward depute, or substitute, or justice of the peace, is hereby authorized and required thereupon to proceed in such and the same manner, conforming to the rules and practice of the law of Scotland, as if the offender had been apprehended within such county or place in Scotland last aforesaid.

Power to justices to summon witnesses to attend and give evidence.

XVI. And be it enacted, that if it shall be made to appear to any justice of the peace, by the oath or affirmation of any credible person, that any person within the jurisdiction of such justice is likely to give material evidence for the prosecution, and will voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the examination of witnesses against the accused, such justice may and is hereby required to issue his summons to such person, under his hand and seal, requiring him to be and appear at a time and place named in such summons before the said justice, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place as shall then be there, to what he shall know concerning the charge made against the accused party; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by the said summons, and no just excuse shall be offered for such neglect or refusal, then (after proof upon oath or affirmation of such summons having been served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode,) it shall be lawful for the justice or justices before whom such person should have appeared to issue a warrant under his or their hands and seals to bring and have such person before the time and place to be therein mentioned before the justice or justices issued the said summons, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place as shall then be there, to testify as aforesaid, and which said warrant may, if necessary, be backed as herein

If summons not obeyed warrant may be issued to compel attendance.

d, in order to its being executed out of the jurisdiction of the justice who shall have issued the same; or if such justice is satisfied by evidence upon oath or affirmation that it is probable that such person will not attend to give evidence without being compelled so to do, then, instead of issuing such summons, it shall be lawful for him to issue his warrant (L. 3.) in the first instance, which, if necessary, may be backed as aforesaid; and the appearance of such person so summoned before the said justice or justices, either in obedience to the said summons, or upon being brought before him or them by virtue of the warrant, such person shall refuse to be examined upon oath or affirmation concerning the premises, or shall refuse to take such oath or affirmation, or having taken such oath or affirmation, shall refuse to answer such questions concerning the premises as may be put to him, without offering any just excuse for such refusal, the justice of the peace then present, and having thereunto power, may by warrant (L. 4.) under his hand and seal commit such person so refusing to the common gaol or house of correction in the county, riding, division, liberty, city, borough, or parish in which such person so refusing shall then be, there to remain imprisoned for any time not exceeding seven days, unless he shall give the meantime consent to be examined and to answer the questions concerning the premises.

And be it enacted, that in all cases where any person shall be brought before any justice or justices of the peace for any indictable offence, whether committed in

Wales, or upon the high seas, or on land beyond the limits of Wales, whether such person appear voluntarily upon summons or be apprehended, with or without warrant, or be in custody of the justice or any other officer, such justice or justices, before whom such accused person shall be brought for trial, or before whom they shall admit him to bail, shall, in the presence of the accused person, who shall be at liberty to put questions to any witness produced against him, take the statement of the witness upon oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and the statements shall be read over to and signed respectively by the witness who shall have been so examined, and shall be

signed by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear for examination as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, and the justice or justices shall have full power and authority to examine the witness if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to attend.

And if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his attorney had a full opportunity of cross-examining the

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

In certain cases
warrant may be
issued in the
first instance.

Persons appear-
ing on sum-
mons, &c.
refusing to be
examined may
be committed.

As to the
examination of
witnesses.

Justice to
administer oath
or affirmation.

Depositions of
persons who
have died, or
who are absent,
may in certain
cases be read
in evidence.

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

After examina-
tion of the
accused, justice
to read depo-
sitions taken
against him,
and caution
him as to any
statement he
may make;

and inform him
that he has
nothing to hope
or fear from
either promise
or threat.

Place where
examination
taken not to be
deemed an open
court, and no
person to re-
main without
consent.

Power to justice
to bind over the
prosecutors and
witnesses by
recognizance.

witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.

XVIII. And be it enacted, that after the examinations of all the witnesses on the part of the prosecution as aforesaid, shall have been completed, the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner shall then say in answer thereto shall be taken down in writing (N.), and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always, that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial notwithstanding such promise or threat: provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.

XIX. And be it declared and enacted, that the room or building in which such justice or justices shall take such examinations and statement as aforesaid shall not be deemed an open court for that purpose; and it shall be lawful for such justice or justices, in his or their discretion, to order that no person shall have access to or be or remain in such room or building without the consent or permission of such justice or justices, if it appear to him or them that the ends of justice will be best answered by so doing.

XX. And be it enacted, that it shall be lawful for the justice or justices before whom any such witness shall be examined as aforesaid to bind by recognizance (O. 1.) the prosecutor and every such witness to appear at the next Court of Oyer and Terminer or Goal

Delivery, or Superior Court of a County Palatine, or Court of General or Quarter Sessions of the Peace, at which the accused is to be tried, then and there to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, against the party accused, which said recognizance shall particularly specify the profession, art, mystery, or trade of every such person entering into or acknowledging the same, together with his Christian and surname, and the parish, township, or place of his residence, and if his residence be in a city, town, or borough, the recognizance shall also particularly specify the name of the street, and the number (if any) of the house in which he resides, and whether he is owner or tenant thereof or a lodger therein; and the said recognizance being duly acknowledged by the person so entering into the same, shall be subscribed by the justice or justices before whom the same shall be acknowledged, and a notice (O. 2.) thereof signed by the said justice or justices, shall at the same time be given to the person bound thereby; and the several recognizances so taken, together with the written information (if any), the depositions, the statement of the accused, and the recognizance of bail (if any) in every such case shall be delivered by the said justice or justices, or he or they shall cause the same to be delivered to the proper officer of the court in which the said trial is to be had, before or at the opening of the said court on the first day of the sitting thereof, or at such other time as the judge, recorder, or justice who is to preside in such court at the said trial shall order and appoint; provided always, that if any such witness shall refuse to enter into or acknowledge such recognizance as aforesaid it shall be lawful for such justice or justices of the peace, by his or their warrant (P. 1.), to commit him to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place in which the accused party is to be tried, there to be imprisoned and safely kept until after the trial of such accused party, unless in the meantime such witness shall duly enter into such recognizance as aforesaid before some one justice of the peace for the county, riding, division, liberty, city, borough, or place in which such gaol or house of correction shall be situate: provided nevertheless, that if afterwards, from want of sufficient evidence in that behalf or other cause, the justice or justices before whom such accused party shall have been brought shall not commit him or hold him to bail for the offence with which he is charged, it shall be lawful for such justice or justices, or any other justice or justices of the same county, riding, division, liberty, city, borough, or place, by his or their order (P. 2.) in that behalf, to order and direct the keeper of such common gaol or house of correction where such witness shall be so in custody to discharge him from the same, and such keeper shall thereupon forthwith discharge him accordingly.

XXI. And be it enacted, that if, from the absence of witnesses, or from any other reasonable cause, it shall become necessary or advisable to defer the examination or further examination of the witnesses for any time, it shall be lawful to and for the justice or

11 & 12 Vict.
c. 42.

Adm.
of Justice.

Recognizance,
depositions, &c.
to be trans-
mitted to the
court in which
the trial is to
be had.

Witnesses re-
fusing to enter
into recogni-
zances may be
committed.

Power to justice
to remand the
accused from
time to time,
not exceeding
eight days, by
warrant.

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

If remand be
for three days
only by verbal
order.

Party accused
may be admit-
ted to bail, on
the examination
being adjourned.

If party does
not appear upon
recognizance,
justice may
transmit the
same to the
clerk of the
peace.

If a person be
apprehended in
one county on
charge of an
offence com-
mitted in
another, he may
be examined in
the former;

justices before whom the accused shall appear or be brought, by his or their warrant (Q. 1.), from time to time to remand the party accused for such time as by such justice or justices in their discretion shall be deemed reasonable, not exceeding eight clear days, to the common gaol or house of correction, or other prison, lock-up house, or place of security in the county, riding, division, liberty, city, borough, or place for which such justice or justices shall then be acting; or if the remand be for a time not exceeding three clear days it shall be lawful for such justice or justices verbally to order the constable or other person in whose custody such party accused may then be, or any other constable or person to be named by the said justice or justices in that behalf, to continue or keep such party accused in his custody, and to bring him before the same or such other justice or justices as shall be there acting at the time appointed for continuing such examination: provided always, that any such justice or justices may order such accused party to be brought before him or them, or before any other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, at any time before the expiration of the time for which such accused party shall be so remanded, and the gaoler or officer in whose custody he shall then be shall duly obey such order: provided also, that, instead of detaining the accused party in custody during the period for which he shall be so remanded, any one justice of the peace before whom such accused party shall so appear or be brought as aforesaid may discharge him, upon his entering into a recognizance (Q. 2. 3.), with or without a surety or sureties, at the discretion of such justice, conditioned for his appearance at the time and place appointed for the continuance of such examination; and if such accused party shall not afterwards appear at the time and place mentioned in such recognizance, then the said justice, or any other justice of the peace who may then and there be present, upon certifying (Q. 4.) on the back of the recognizance the nonappearance of such accused party, may transmit such recognizance to the clerk of the peace of the county, riding, division, liberty, city, borough, or place within which such recognizance shall have been taken, to be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie* evidence of such nonappearance of the said accused party.

XXII. And whereas it often happens that a person is charged before a justice of the peace with an offence alleged to have been committed in another county or place than that in which such person has been apprehended or in which such justice has jurisdiction, and it is necessary to make provision as to the manner of taking the examinations of the witnesses, and of committing the party accused, or admitting him to bail, in such a case; be it therefore enacted, that whenever a person shall appear or shall be brought before a justice or justices of the peace in the county, riding, division, liberty, city, borough, or place wherein such justice or justices shall have jurisdiction, charged with an offence

alleged to have been committed by him in any county or place within England or Wales wherein such justice or justices shall not have jurisdiction, it shall be lawful for such justice or justices and he and they are hereby required to examine such witnesses, and receive such evidence in proof of such charge as shall be produced before him or them, within his or their jurisdiction; and if in his or their opinion such testimony and evidence shall be sufficient proof of the charge made against such accused party, such justice or justices shall thereupon commit him to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place where the offence is alleged to have been committed, or shall admit him to bail, as hereinafter mentioned, and shall bind over the prosecutor (if he have appeared before him or them) and the witnesses by recognizance accordingly, as is hereinbefore mentioned; but if such testimony and evidence shall not in the opinion of such justice or justices be sufficient to put the accused party upon his trial for the offence with which he is so charged, then such justice or justices shall bind over such witnesses as he shall have examined, by recognizance, to give evidence, as hereinbefore is mentioned, and such justice or justices shall, by warrant (R. 1.) under his or their hand and seal or hands and seals, order such accused party to be taken before some justice or justices of the peace in and for the county, riding, division, liberty, city, borough, or place where and near unto the place where the offence is alleged to have been committed, and shall at the same time deliver the information and complaint, and also the depositions and recognizances so taken by him or them, to the constable who shall have the execution of such last-mentioned warrant, to be by him delivered to the justice or justices before whom he shall take the accused in obedience to the said warrant, and which said depositions and recognizances shall be deemed to be taken in the case, and shall be treated to all intents and purposes as if they had been taken by or before the said last-mentioned justice or justices, and shall, together with such depositions and recognizances as such last-mentioned justice or justices shall take in the matter of such charge against the said accused party be transmitted to the clerk of the court where the said accused party is to be tried, in the manner and at the time hereinbefore mentioned, if such accused party shall be committed for trial upon the said charge, or shall be admitted to bail; and in case such accused party shall be taken before the justice or justices last aforesaid by virtue of the said last-mentioned warrant, the constable or other person or persons to whom the said warrant shall have been directed, and who shall have conveyed such accused party before such last-mentioned justice or justices, shall be entitled to be paid his costs and expenses of conveying the said accused party before the said justice or justices; and upon the said constable or other person producing the said accused party before such justice or justices, and delivering him into the custody of such person as the said justice or justices shall direct or name

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

and if evidence
be deemed
sufficient may
be committed
to prison.

If insufficient
to be brought
before some
justice in the
latter county.

As to payment
of expenses of
conveying the
accused into the
proper county,
&c.

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

in that behalf, and upon the said constable delivering to the said justice or justices the warrant, information (if any), depositions, and recognizances aforesaid, and proving by oath the handwriting of the justice or justices who shall have subscribed the same, such justice or justices to whom the said accused party is so produced shall thereupon forthwith ascertain the sum which ought to be paid to such constable or other person for conveying such accused party and taking him before such justice or justices, as also his reasonable costs and expenses of returning, and thereupon such justice or justices shall make an order (R. 2.) upon the treasurer of the county, riding, division, or liberty, city, borough, or place, or if such city, borough, or place shall be contributory to the county rate of any county, riding, division, or liberty, then upon the treasurer of such county, riding, division, or liberty respectively to which it is contributory, for payment to such constable or other person of the sum so ascertained to be payable to him in that behalf, and the said treasurer, upon such order being produced to him, shall pay the amount to the said constable or other person producing the same, or to any person who shall present the same to him for payment: provided always, that if such last-mentioned justice or justices shall not think the evidence against such accused party sufficient to put him upon his trial, and shall discharge him without holding him to bail, every such recognizance so taken by the said first-mentioned justice or justices as aforesaid shall be null and void.

Power to justice
to admit to bail
persons charged
with felony and
certain misde-
meanors.

XXIII. And be it enacted, that where any person shall appear or be brought before a justice of the peace charged with any felony, or with any assault with intent to commit any felony, or with any attempt to commit any felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person acting in his aid, or with neglect or breach of duty as a peace officer, or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate, such justice of the peace may, in his discretion, admit such person to bail, upon his procuring and producing such surety or sureties as in the opinion of such justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence; and thereupon such justice shall take the recognizance (S. 1. 2.) of the said accused person and his surety or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial, and not depart the court without leave; and in all cases where a person charged with any indictable offence shall be committed to prison to take his trial for the same, it shall be lawful, at any time afterwards, and before the first day of the sitting or session at which he is to be tried, or before the day to

Justices may
admit to bail in
the like cases
after commit-
ment for trial.

which such sitting or session may be adjourned, for the justice or justices of the peace who shall have signed the warrant for his commitment, in his or their discretion, to admit such accused person to bail in manner aforesaid; or if such committing justice or justices shall be of opinion that for any of the offences hereinbefore mentioned the said accused person ought to be admitted to bail, he or they shall in such cases, and in all other cases of misdemeanors, certify (S. 3.) on the back of the warrant of commitment his or their consent to such accused party being bailed, stating also the amount of bail which ought to be required, it shall be lawful for any justice of the peace, attending or being at the gaol or prison where such accused party shall be in custody, on production of such certificate, to admit such accused person to bail in manner aforesaid; or if it shall be inconvenient for the surety or sureties in such a case to attend at such gaol or prison to join with such accused person in the recognizance of bail, then such committing justice or justices may make a duplicate of such certificate (S. 4.) as aforesaid, and upon the same being produced to any justice of the peace for the same county, riding, division, liberty, city, borough, or place, it shall be lawful for such last-mentioned justice to take the recognizance of the surety or sureties in conformity with such certificate, and upon such recognizance being transmitted to the keeper of such gaol or prison, and produced together with the certificate on the warrant of commitment as aforesaid to any justice of the peace attending or being at such gaol or prison, it shall be lawful for such last-mentioned justice thereupon to take the recognizance of such accused party, and to order him to be discharged out of custody as to that commitment, as hereinafter mentioned; and where any person shall be charged before any justice of the peace with any indictable misdemeanor other than those hereinbefore mentioned, such justice, after taking the examinations in writing as aforesaid, instead of committing him to prison for such offence, shall admit him to bail in manner aforesaid, or if he have been committed to prison, and shall apply to any one of the visiting justices of such prison, or to any other justice of the peace for the same county, riding, division, liberty, city, borough, or place, before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, to be admitted to bail, such justice shall accordingly admit him to bail in manner aforesaid; and in all cases where such accused person in custody shall be admitted to bail by a justice of the peace other than the committing justice or justices as aforesaid, such justice of the peace so admitting him to bail shall forthwith transmit the recognizance or recognizances of bail to the committing justice or justices, or one of them, to be by him or them transmitted, with the examinations, to the proper officer: provided nevertheless, that no justice or justices of the peace shall admit any person to bail for treason, nor shall such person be admitted to bail, except by order of one of Her Majesty's Secretaries of State, or by Her Majesty's Court

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

Justice may
admit to bail
persons charged
with other
misdemeanors.

Certain recog-
nizance to be
transmitted to
committing
justices.

No bail in cases
of treason, but
by order of
Secretary of
State, &c.

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

Where defendant entitled to traverse.

of Queen's Bench at Westminster, or a judge thereof in vacation: provided also, that when, in cases of misdemeanor, the defendant shall be entitled to a traverse at the next assizes or quarter sessions, and shall not be bound to take his trial until the second assizes or sessions, in every such case the recognizance (S. 1.) of bail shall be conditioned that he shall appear and plead at the next assizes or sessions, and then traverse the indictment, and that he shall surrender and take his trial at such second assizes or sessions, unless such accused party shall, before he enter into such recognizance, choose and consent to take his trial at such first assizes or sessions, in which case the recognizance may be in the ordinary form hereinbefore mentioned.

When justice admits a person to bail after commitment a writ of deliverance shall be sent to him, if not detained for any other offence.

XXIV. And be it enacted, that in all cases where a justice or justices of the peace shall admit to bail any person who shall then be in any prison charged with the offence for which he shall be so admitted to bail, such justice or justices shall send to or cause to be lodged with the keeper of such prison a warrant of deliverance (S. 5.) under his or their hand and seal or hands and seals, requiring the said keeper to discharge the person so admitted to bail, if he be detained for no other offence, and upon such warrant of deliverance being delivered to or lodged with such keeper he shall forthwith obey the same.

If, after hearing evidence against the accused, it is not thought sufficient to warrant commitment the shall be discharged; but if evidence considered sufficient, justice shall, by warrant, commit the accused for trial.

XXV. And be it enacted, that when all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the justice or justices of the peace then present shall be of opinion that it is not sufficient to put such accused party upon his trial for any indictable offence, such justice or justices shall forthwith order such accused party, if in custody, to be discharged as to the information then under inquiry; but if, in the opinion of such justice or justices, such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise a strong or probable presumption of the guilt of such accused party, then such justice or justices shall, by his or their warrant (T. 1.), commit him to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place to which by law he may now be committed, or in the case of an indictable offence committed on the high seas, or on land beyond the sea, to the common gaol of the county, riding, division, liberty, city, borough, or place within which such justice or justices shall have jurisdiction, to be there safely kept until he shall be thence delivered by due course of law, or admit him to bail as hereinbefore mentioned.

Regulations for conveying prisoners to gaol.

XXVI. And be it enacted, that the constable or any of the constables or other persons to whom the said warrant of commitment shall be directed shall convey such accused person therein named or described to the gaol or other prison mentioned in such warrant, and there deliver him, together with such warrant, to the gaoler, keeper, or governor of such gaol or prison, who shall thereupon give such constable or other person so delivering such prisoner into his custody a receipt (T. 2.) for such prisoner, setting forth the state and

condition in which such prisoner was when he was delivered into the custody of such gaoler, keeper, or governor; and in all cases where such constable or other person shall be entitled to his costs or expenses for conveying such person to such prison as aforesaid it shall be lawful for the justice or justices who shall have committed the accused party, or for any justice of the peace in and for the said county, riding, division, or other place of exclusive jurisdiction wherein the offence is alleged in the said warrant to have been committed, to ascertain the sum which ought to be paid to such constable or other person for conveying such prisoner to such gaol or prison, and also the sum which should reasonably be allowed him for his expenses in returning, and thereupon such justice shall make an order (T. 2.) upon the treasurer of such county, riding, division, liberty, or place of exclusive jurisdiction, or if such place of exclusive jurisdiction shall be contributory to the county rate of any county, riding, or division, then upon the treasurer of such county, riding, or division respectively, or, in the county of Middlesex, upon the overseers of the poor of the parish or place within which the offence is alleged to have been committed, for payment to such constable or other person of the sums so ascertained to be payable to him in that behalf; and the said treasurer or overseers, upon such order being produced to him or them respectively, shall pay the amount thereof to such constable or other person producing the same, or to any person who shall present the same to him or them for payment: provided, nevertheless, that if it shall appear to the justice or justices by whom any such warrant of commitment against such prisoner shall be granted as aforesaid that such prisoner hath money sufficient to pay the expenses, or some part thereof, of conveying him to such gaol or prison, it shall be lawful for such justice or justices, in his or their discretion, to order such money or a sufficient part thereof to be applied to such purpose.

XXVII. And be it enacted, that at any time after all the examinations aforesaid shall have been completed, and before the first day of the assizes or sessions or other first sitting of the court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three half-pence for each folio of ninety words.

XXVIII. And be it enacted, that the several forms in the schedule to this act contained, or forms to the same or the like effect, shall be deemed good, valid, and sufficient in law.

XXIX. And be it enacted, that any one of the magistrates appointed or hereafter to be appointed to act at any of the police courts of the metropolis, and sitting at a police court within the Metropolitan Police District, and every stipendiary magistrate appointed or to be appointed for any other city, town, liberty, borough, or place, and sitting at a police court or other place appointed in that behalf, shall have full power to do alone what-

11 & 12 Vict.
c. 42.

*Adm.
of Justice.*

As to payment
of costs convey-
ing prisoners to
prison.

After examina-
tions are com-
pleted defend-
ant entitled to
copies of the
depositions.

Forms in
schedule
deemed valid.

Metropolitan
police magis-
trates and
stipendiary
magistrates in
other places
may act alone.

- 11 & 12 Vict.
c. 42.
—
*Adm.
of Justice.*
—
- Nothing to
affect powers,
&c., contained
in 10 Geo. 4,
c. 44; 2 & 3
Vict. c. 47;
2 & 3 Vict.
c. 71; and 3 & 4
Vict. c. 84.
- The Lord
Mayor, or any
alderman of
London, may
act alone.
- Nothing to
affect power,
&c., contained
in 2 & 3 Vict.
c. 94.
- Chief Magis-
trate of Bow-
street may be a
justice for
Berks, without
qualification.
- Act to extend
to Berwick-
upon-Tweed,
but not to
Scotland, Ire-
land, &c. ex-
cept as to
backing of
warrants.
- Commencement
of Act.
- After com-
mencement of
this act the
following acts
and parts of
acts repealed.
- soever is authorized by this act to be done by any one or more justice or justices of the peace; and that the several forms in the schedule to this act contained may be varied, so far as it may be necessary to render them applicable to the police courts aforesaid, or to the court or other place of sitting of such stipendiary magistrate; and that nothing in this act contained shall alter or affect in any manner whatsoever any of the powers, provisions, or enactments contained in an act passed in the tenth year of the reign of His late Majesty King George the Fourth, intituled *An Act for improving the Police in and near the Metropolis*, or in an act passed in the third year of the reign of Her present Majesty, intituled *An Act for further improving the Police in and near the Metropolis*, or in an act passed in the same year of the reign of Her present Majesty, intituled *An Act for regulating the Police Courts in the Metropolis*, or in an act passed in the fourth year of the reign of Her present Majesty, intituled *An Act for better defining the Powers of Justices within the Metropolitan Police District*.
- XXX. And be it enacted, that it shall be lawful for the Lord Mayor of the City of London, or for any alderman of the said city for the time being, sitting at the Mansion House or Guildhall justice rooms in the said city, to do alone any act, at either of the said justice rooms, which by any law now in force, or by any law not containing an express enactment to the contrary hereafter to be made, is or shall be directed to be done by more than one justice; and that nothing in this act contained shall alter or affect in any manner whatsoever any of the powers, provisions, or enactments contained in an act passed in the third year of the reign of Her present Majesty, entitled *An Act for regulating the Police in the City of London*.
- XXXI. And be it enacted, that the chief magistrate of the metropolitan police court at Bow-street for the time being shall be a justice of the peace of and for the county of Berks, if his name be inserted in the commission of the peace for that county, without possessing the qualification by estate required by law in that behalf, and without taking any oath of qualification.
- XXXII. And be it enacted, that the town of Berwick-upon-Tweed shall be deemed to be within England for all the purposes of this act, but nothing in this act shall be deemed or taken to extend to Scotland or Ireland, or to the Isles of Man, Jersey, or Guernsey, save and except the several provisions respectively hereinbefore contained respecting the backing of warrants, and also nothing in this act shall be deemed to alter or affect the jurisdiction or practice of Her Majesty's Court of Queen's Bench.
- XXXIII. And be it enacted, that this act shall commence and take effect on the second day of October in the year of our Lord one thousand eight hundred and forty-eight.
- XXXIV. And be it enacted, that the following statutes and parts of statutes shall from and after the day on which this act shall commence and take effect be and the same are hereby repealed; (that is to say,) a certain act of Parliament made and passed in the

thirteenth year of the reign of His late Majesty King George the Third, intituled *An Act for the more effectual Execution of Criminal Laws in the two parts of the United Kingdom*; and a certain other act made and passed in the twenty-eighth year of the reign of his said late Majesty King George the Third, intituled *An Act to enable Justices of the Peace to act as such in certain Cases out of the Limits of the Counties in which they actually are*; and so much of a certain other act made and passed in the forty-fourth year of the reign of his said Majesty King George the Third, intituled *An Act to render more easy the apprehending and bringing to trial Offenders escaping from one part of the United Kingdom to the other, and also from one County to another*, as relates to the apprehension of offenders escaping from Ireland into England, or from England into Ireland, and to the backing of warrants against such offenders; and so much of a certain other act made and passed in the forty-fifth year of the reign of his said Majesty King George the Third, intituled *An Act to amend two Acts of the thirteenth and forty-fourth years of His present Majesty, for the more effectual Execution of the Criminal Laws, and more easy apprehending and bringing to Trial Offenders escaping from one part of the United Kingdom to the other, and from one County to another*, as relates to the bailing of offenders escaping from Ireland into England, or from England into Ireland; and also a certain other act made and passed in the fifty-fourth year of the reign of His said late Majesty King George the Third, intituled *An Act for the more easy apprehending and trying of Offenders escaping from one part of the United Kingdom to the other*; and also a certain other act made and passed in the first year of the reign of His late Majesty King George the Fourth, intituled *An Act to amend an Act made in the twenty-eighth Year of the Reign of King George the Third, intituled "An Act to enable Justices of the Peace to act as such in certain Cases out of the Limits of the Counties in which they actually are"*; and so much of a certain other act made and passed in the third year of the reign of His said late Majesty King George the Fourth, intituled *An Act for the more speedy Return and levying of Fines, Penalties, and Forfeitures, and Recognizances estreated*, as relates to the form of recognizances, and to the notice to be given to persons acknowledging the same; and so much of a certain other act made and passed in the seventh year of the reign of His said late Majesty King George the Fourth, intituled *An Act to enable Commissioners for trying Offences upon the Sea, and Justices of the Peace, to take examinations touching such Offences, and to commit to safe Custody Persons charged herewith*, as relates to the taking of such examinations, and the commitment of persons so charged, by justices of the peace; and so much of a certain other act made and passed in the said seventh year of the reign of His said late Majesty King George the Fourth, intituled *An Act for improving the Administration of Criminal Justice in England*, as relates to the taking of bail in cases of felony, and to the taking of the examinations and infor-

11 & 12 Vict.
c. 42.

Adm.
of Justice.

13 Geo. 3,
c. 31.

28 Geo. 3,
c. 49.

44 Geo. 3,
c. 92.

45 Geo. 3,
c. 92.

54 Geo. 3,
c. 186.

1 & 2 Geo. 4,
c. 63.

3 Geo. 4, c. 46.

7 Geo. 4, c. 38.

7 Geo. 4, c. 64.

- 11 & 12 Vict.
c. 42.
*Adm.
of Justice.*
- 5 & 6 Will. 4,
c. 33.
- 6 & 7 Will. 4,
c. 114.
- Act may be
amended, &c.
- mations against persons charged with felonies and misdemeanors, and binding persons by recognizance to prosecute or give evidence; and so much of a certain act made and passed in the sixth year of the reign of His late Majesty King William the Fourth, intituled *An Act for preventing the vexatious Removal of Indictments into the Court of King's Bench, and for extending the Provisions of an Act of the Fifth Year of King William and Queen Mary, for Preventing Delays at the Quarter Sessions of the Peace, to other Indictments, and for extending the Provisions of an Act of the Seventh Year of King George the Fourth as to taking Bail in Cases of Felony*, as relates to the taking of bail in cases of felony; and so much of a certain other act made and passed in the seventh year of the reign of His said late Majesty King William the Fourth, intituled *An Act for enabling Persons indicted for Felony to make their Defence by Counsel or Attorney*, as relates to the right of parties charged with offences to have copies of the depositions or examinations against them; and all other act or acts or parts of acts which are inconsistent with the provisions of this act; save and except so much of the said several acts as repeal any other act or parts of acts, and also except as to proceedings now pending to which the same or any of them are applicable.
- XXXV. And be it enacted, that this act may be amended or repealed by any act to be passed in the present session of Parliament

No. I.

Indictment under the 7 & 8 Vict. c. 112, for attempting to traffic in Seamen's Register Tickets.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present, that heretofore
and after the passing of an act passed in the 8th year of our Sovereign
Lady Queen Victoria, intituled *An Act to amend and consolidate the Laws
relating to Merchant Seamen, and for keeping a Register of Seamen*;
and after the first day of January in the year of our Lord 1845, to wit,
on the 14th day of January, in the year of our Lord 1848, to wit, at the
Custom House of the Out-port of Rochester, to wit, at the parish of
Woolwich, in the county of Kent, and within the jurisdiction of the said
court, one Charles Keer, then being a subject of Her Majesty, and being
such subject, and intending to serve in the capacity of a seaman on board
some ship subject to the provisions of the said act, and not being a master,
physician, surgeon, or apothecary, or any or either of them, did personally
apply on the day and year last aforesaid, to the Collector of Customs of
the said Out-port of Rochester aforesaid, to wit, at the parish aforesaid, in
the county aforesaid, and within the jurisdiction of the said court, and
did then and there require to be furnished with a register ticket, and
having duly answered all the questions set forth in the schedule (F.) to
the said act annexed, and having duly complied with all the provisions of
the said act in that behalf contained, did entitle himself to have granted
to him and to receive, and then and there had granted to him, and then
and there he did receive and have a register ticket, to wit, the register
ticket No. 384,484, pursuant to the provisions of the said act, and ac-
cording to the true purport and intent thereof, in the words and figures
following; that is to say:—

Precedents.

No. I.
Indictment
under the 7 & 8
Vict. c. 112,
for attempting
to traffic in
seamen's re-
gister tickets.

“MARINER'S REGISTER TICKET,

“Issued pursuant to the Act of 7th & 8th of Victoria, cap. 112.
No. of Ticket, 384,484.

(Three hundred and eighty-four thousand four hundred and eighty-four.)

“Name, Charles Keer, born at Blaxhall, in the county of Suffolk,
on the 16th day of January, 1829. Capacity, steward. Height,
5 feet, 7 inches. Hair, brown. Complexion, fresh. Eyes, blue.
Marks on person, none.

“Bearer's signature, CHARLES KEER.

“This ticket was issued from the general Register and Record Office
of Seamen, to the Collector and Comptroller of Customs of the Port
of Rochester, for the purposes of the above-mentioned act.

E. COLEMAN, pro Registrar.

“Issued to the above-named Charles Keer, by the
Collector and Comptroller of Customs of the Port of
Rochester, on the 14th January, 1848.

“Examined and entered by

“JOHN BATTEN.”

“JOHN BATTEN,

“Collector.



Precedents.
 No. I.
 Indictment
 under the 7 & 8
 Vict. c. 112, for
 attempting to
 traffic in sea-
 men's register
 tickets.

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that after the said Charles Keer had so obtained such register ticket, and while the same was lawfully in his possession, Frederick Stapleton, late of the parish aforesaid, in the county aforesaid, labourer, to wit, on the 20th day of January, in the year of our Lord 1848 aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did obtain possession of the said register ticket from the said Charles Keer, and whilst he, the said Frederick Stapleton, was so possessed of the said register ticket so granted to the said Charles Keer, to wit, on the 29th day of January, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did wilfully, knowingly, and unlawfully attempt to transfer for gain, to wit, 2s. of lawful money of Great Britain, the said register ticket to one George Moore, to enable him, the said George Moore, to appear the owner and possessor thereof, and to secure the benefits incident thereto, against the peace of our Lady the now Queen, and against the form of the statute in such case made and provided.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, further present, that heretofore and after the passing of the said act of Parliament, in the said 1st count mentioned, intituled *An Act to amend and consolidate the Laws relating to Merchant Seamen, and for keeping a Register of Seamen*, to wit, on the said 14th day of January, in the year of our Lord 1848 aforesaid, to wit, at the said Custom House of the Out-port of Rochester aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, the said Charles Keer then being a subject of Her Majesty, and being such subject, and intending to serve in the capacity of a seaman on board some ship subject to the provisions of the said act, not being a master, physician, surgeon, or apothecary, and not intending to serve in the capacity of master, physician, surgeon, or apothecary, or any or either of them, did personally apply on the day and year last aforesaid, to the Collector of Customs of the said Out-port of Rochester aforesaid, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, and did then and there require to be furnished with a certain other register ticket, and having duly answered all the questions set forth in the schedule (F.) to the said act annexed, and having duly complied with all the provisions of the said act in that behalf contained, did entitle himself to have granted to him, and to receive, and then and there had granted to him, and then and there he did receive and have, a register ticket, to wit, the register ticket No. 384,484, pursuant to the provisions of the said act, and according to the true intent and purport thereof, in the words and figures following, that is to say, [Here the ticket is again set out.] And the jurors aforesaid, upon their oath aforesaid, do further present, that after the said Charles Keer had so obtained such last-mentioned register ticket, and while the same was lawfully in his possession, the said Frederick Stapleton, to wit, on the 20th day of January, in the year of our Lord 1848 aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, obtained possession of the said last-mentioned register ticket from the said Charles Keer, and while he the said Frederick Stapleton was so possessed of the said last-mentioned register ticket, so granted to the said Charles Keer, to wit, on the said 20th day of January, in the year of our Lord 1848 aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did wilfully, knowingly, and unlawfully

attempt to traffic in for gain, to wit, for a certain sum of money, to wit, 2s. of lawful money of Great Britain for the said register ticket, to enable the said George Moore to appear the owner and possessor thereof, and secure the benefits incident thereto, against the peace of our said Lady the now Queen, and against the form of the statute in such case made and provided.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and after the passing of the said act of Parliament in the said 1st count mentioned, intituled *An Act to amend and consolidate the Laws relating to Merchant Seamen, and for keeping a Register of Seamen*, to wit, on the said 14th day of January, in the year of our Lord 1848 aforesaid, to wit, at the Custom House of the Out-port of Rochester, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, the said Charles Keer, then being a subject of Her Majesty, and being such subject and intending to serve in the capacity of a seaman on board some ship subject to the provisions of the said act, and not being a master, physician, surgeon, or apothecary, and not intending to serve in the capacity of a master, physician, surgeon, or apothecary, or any or either of them, did personally apply, on the day and year last aforesaid, to John Batten, he the said John Batten then and there being an officer duly appointed to perform the duty and service at the customs of the said Out-port of Rochester aforesaid, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, and did then and there require to be furnished with a certain other register ticket, and having duly answered all the questions set forth in the schedule (F.) to the said act annexed, and having duly complied with all the provisions of the said act in that behalf contained, did entitle himself to have granted to him and to receive, and then and there had granted to him, and then and there he did receive and have, a register ticket, to wit, the register ticket No. 384,484, pursuant to the provisions of the said act, and according to the true purport and intent thereof, in the words and figures following, that is to say, [Here the ticket is again set out.] And the jurors aforesaid, upon their oath aforesaid, do further present, that after the said Charles Keer had so obtained such last-mentioned register ticket, the said Frederick Stapleton, to wit, on the said 20th day of January, in the year of our Lord 1848 aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, obtained possession of the said last-mentioned register ticket, and while he the said Frederick Stapleton was possessor of the said last-mentioned register ticket, so granted to the said Charles Keer, to wit, on the said 20th day of January, in the year of our Lord 1848 aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did wilfully, knowingly, and unlawfully attempt to traffic in for gain, to wit, for a certain sum of money, to wit, 2s. of lawful money of Great Britain for the said last-mentioned register ticket, to enable the said George Moore to appear the owner and possessor thereof, and to secure the benefits incident thereto, against the peace of our Lady the now Queen, and against the form of the statute in such case made and provided.

Fourth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and after the passing of the act of Parliament in the said 1st count mentioned, intituled *An Act to amend and consolidate the Laws relating to Merchant Seamen, and for keeping a*

Precedents.

No. I.

Indictment under the 7 & 8 Vict. c. 112, for attempting to traffic in seamen's register tickets.

Third count.

Precedents.

No. I.
Indictment
under the 7 & 8
Vict. c. 112, for
attempting to
traffic in sea-
men's register
tickets.

Register of Seamen, to wit, on the said 14th day of January, in the year of our Lord 1848 aforesaid, to wit, at the Custom House of the Out-port of Rochester aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, the said Charles Keer, then being a subject of Her Majesty, and being such subject and intending to serve in the capacity of a seaman on board some ship subject to the provisions of the said act, and not being a master, physician, surgeon, or apothecary, and not intending to serve in the capacity of master, physician, surgeon, or apothecary, or any or either of them, did personally apply on the day and year last aforesaid, to the Collector and Comptroller of Customs of the said Out-port of Rochester aforesaid, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, and did then and there require to be furnished with a certain other register ticket, and having duly answered all the questions set forth in the schedule (F.) to the said act annexed, and having duly complied with all the provisions of the said act in that behalf contained, did entitle himself to have granted to him and to receive, and then and there had granted to him, and then and there he did receive and have, a register ticket, to wit, the register ticket No. 384,484, pursuant to the provisions of the said act, and according to the true intent and purport thereof, in the words and figures following, that is to say, [Here the ticket is again set out.] And the jurors aforesaid, upon their oath aforesaid, do further present, that after the said Charles Keer had so obtained such last-mentioned register ticket, and while the same was lawfully in his possession, the said Frederick Stapleton, to wit, on the said 20th day of January, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did wilfully, knowingly, and unlawfully attempt to traffic with the said Charles Keer for the transfer of the said last-mentioned register ticket for gain, to wit, for a certain sum of money, to wit, 2s. of lawful money of Great Britain, and the said Charles Keer did then, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of this court, receive the same, and did hand over the said last-mentioned register ticket to the said Frederick Stapleton, and the said Frederick Stapleton then accepted and received the same, against the peace of our said Lady the now Queen, and against the form of the statute in such case made and provided.

Fifth count.

Fifth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Frederick Stapleton, to wit, on the 20th day of June, in the year of our Lord 1848 aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, one register ticket, then being a certain register ticket, issued in pursuance of the provisions of an act made and passed in a certain session of Parliament, holden in the 7th and 8th years of the reign of Her Majesty Queen Victoria, and intituled *An Act to amend and consolidate the Laws relating to Merchant Seamen, and for keeping a Register of Seamen*, wilfully, knowingly, and unlawfully did attempt to traffic with, and to transfer for gain, to wit, for a certain sum of 2s., against the peace of our Lady the now Queen, and against the form of the statute in such case made and provided.

Sixth count.

Sixth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Frederick Stapleton, to wit, on the said 20th day of January, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, one other register ticket, then being a certain register ticket

issued in pursuance of the said statute, wilfully, knowingly, and unlawfully did attempt to traffic with for gain, to wit, for a certain sum of 2s., against the peace of our Lady the now Queen, and against the form of the statute in such case made and provided.

Precedents.

No. I.
Indictment
under the 7 & 8
Vict. c. 112, for
attempting to
traffic in sea-
men's register
tickets.

No. II.

Indictment under 49 Geo. 3, c. 126, for trafficking in Appointments to Public Offices.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present, that T. W. S.,
late of the parish of Saint Margaret, Westminster, in the county of Middlesex, gentleman, hereto and after the 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from one W. J. a promise of and contracted and agreed with the said W. J. to receive from him a certain sum of money, to wit, the sum of 200*l.*, for a recommendation to be made by him the said T. W. S., of him the said W. J., to be appointed to a certain office under the appointment, superintendence, and control of the Commissioners of Her Majesty's Treasury, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

No. II.
Indictment
under 49 Geo. 3,
c. 126, for
trafficking in
appointments
to public
offices.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J. to receive from him a certain large sum of money, to wit, the sum of 200*l.*, for a recommendation then and there pretended to be made by him the said T. W. S., of him the said W. J., to be appointed to a certain office under the appointment, superintendence, and control of the Commissioners of Her Majesty's Treasury, contrary to the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J. to receive from him a large sum of money, to wit, the sum of 200*l.* under the pretence of his, the said T. W. S., making a recommendation of him the said W. J., to be appointed to a certain office under the appointment, superintendence, and control of the Commissioners of Her Majesty's Treasury, contrary to the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

- Precedents.* *Fourth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J. to receive from him a large sum of money, to wit, the sum of 200*l.*, for the interest, solicitation, recommendation, and negotiation of him the said T. W. S., to be made in and about the procuring the nomination and appointment of him the said W. J. to a certain office, under the appointment, superintendence, and control of the Commissioners of Her Majesty's Treasury, contrary to the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.
- Fifth count.* *Fifth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took a promise of and contracted and agreed with the said W. J. to receive of him a large sum of money, to wit, the sum of 200*l.*, under the pretence of making and causing to be made interest, solicitation, recommendation, and negotiation in and about procuring the nomination and appointment of him the said W. J., to a certain office under the appointment, superintendence, and control of the Commissioners of Her Majesty's Treasury, contrary to the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.
- Sixth count.* *Sixth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J. to receive from him a large sum of money, to wit, the sum of 600*l.*, for a recommendation to be made by him the said T. W. S. of him the said W. J., to be appointed to a certain office bearing relation to Her Majesty's Treasury, and under the superintendence and control of the Lords Commissioners of Her Majesty's Treasury, contrary to the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.
- Seventh count.* *Seventh Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J., to receive from him a certain large sum of money, to wit, the sum of 600*l.*, for a recommendation then and there pretended to be made by him the said T. W. S., of him the said W. J., to be appointed to a certain office bearing relation to Her Majesty's Treasury, and under the superintendence and control of the Lords Commissioners of Her Majesty's Treasury, contrary to the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

No. II.
Indictment
under 49 Geo. 3,
c. 126, for
trafficking in
appointments to
public offices.
Fourth count.

Eighth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J., to receive from him a large sum of money, to wit, the sum of 600*l.* under the pretence of making a recommendation of him the said W. J., to be appointed to a certain office having relation to Her Majesty's Treasury, and under the superintendence and control of the Lords Commissioners of Her Majesty's Treasury, contrary to the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

Precedents.

No. II.
Indictment
under 49 Geo. 3,
c. 126, for
trafficking in
appointments to
public offices.
Eighth count.

Ninth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J. to receive from him a large sum of money, to wit, the sum of 600*l.* for the interest, solicitation, recommendation, and negotiation of him the said T. W. S., to be made in and about the procuring the nomination and appointment of him the said W. J., to a certain office bearing relation to Her Majesty's Treasury, and under the superintendence and control of the Lords Commissioners of Her Majesty's Treasury, contrary to the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

Ninth count.

Tenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took a promise of and contracted and agreed with the said W. J. to receive of him a large sum of money, to wit, the sum of 600*l.* under the pretence of making and causing to be made interest, solicitation, recommendation, and negotiation in and about the nomination and appointment of him the said W. J., to a certain office bearing relation to Her Majesty's Treasury, and under the superintendence and control of the Lords Commissioners of Her Majesty's Treasury, contrary to the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

Tenth count.

Eleventh Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J., to receive from him a large sum of money, to wit, the sum of 600*l.* for a recommendation to be made by him the said T. W. S., of him the said W. J., to be appointed to a certain office of the yearly value of 200*l.*, bearing relation to the Treasury, and being an office within the true intent and meaning of a certain act of Parliament, made and passed in the forty-ninth year of the reign of our late Lord King George the Third,

Eleventh count.

Precedents. intituled *An Act for the further Prevention of the Sale and Brokerage of Offices*, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

No. II.
Indictment
under 49 Geo. 3,
c. 126, for
trafficking in
appointments to
public offices.
Twelfth count.

Twelfth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J. to receive from him a large sum of money, to wit, the sum of 600*l.* for a recommendation then and there pretended to be made by him the said T. W. S., of him the said W. J., to be appointed to a certain office of the yearly value of 200*l.*, bearing relation to the Treasury, and being an office within the true intent and meaning of a certain act of Parliament made and passed in the forty-ninth year of the reign of His late Majesty King George the Third, intituled *An Act for the further Prevention of the Sale and Brokerage of Offices*, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Thirteenth
count.

Thirteenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J. to receive from him a large sum of money, to wit, the sum of 600*l.* under the pretence of making a recommendation of him the said W. J. to be appointed to a certain office of the yearly value of 200*l.*, bearing relation to the Treasury, and being an office within the true intent and meaning of a certain act of Parliament made and passed in the forty-ninth year of the reign of His late Majesty King George the Third, intituled *An Act for the further Prevention of the Sale and Brokerage of Offices*, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Fourteenth
count.

Fourteenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J. to receive from him a large sum of money, to wit, the sum of 600*l.* for the interest, solicitation, recommendation, and negotiation of him the said T. W. S., to be made in and about the nomination and appointment of him the said W. J. to a certain office of the yearly value of 200*l.*, bearing relation to the Treasury, and being an office within the true intent and meaning of a certain act of Parliament made and passed in the forty-ninth year of the reign of His late Majesty King George the Third, intituled *An Act for the further Prevention of the Sale and Brokerage of Offices*, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Fifteenth
count.

Fifteenth Count.—And the jurors aforesaid, upon their oath aforesaid,

said, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took a promise of and contracted and agreed with the said W. J. to receive of him a large sum of money, to wit, the sum of 600*l.* under the pretence of making and causing to be made interest, solicitation, recommendation, and negotiation in and about the nomination and appointment of him the said W. J. to a certain office of the yearly value of 200*l.*, bearing relation to the Treasury, and being an office within the true intent and meaning of a certain act of Parliament made and passed in the forty-ninth year of the reign of our late Lord King George the Third, intituled *An Act for the further Prevention of the Sale and Brokerage of Offices*, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Precedents.

No. II.
Indictment
under 49 Geo. 3,
c. 126, for
trafficking in
appointments to
public offices.

Sixteenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J. to receive from him a certain large sum of money, to wit, the sum of 600*l.* for a recommendation to be made by him the said T. W. S., of him the said W. J., to be appointed to a certain place under the appointment, superintendence, and control of the principal officers of Her Majesty's Treasury, against the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

Sixteenth
count.

Seventeenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J. to receive from him a large sum of money, to wit, the sum of 600*l.* for a recommendation then and there pretended to be made by him the said T. W. S., of him the said W. J., to be appointed to a certain place under the appointment, superintendence, and control of the principal officers of Her Majesty's Treasury, against the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

Seventeenth
count.

Eighteenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J. to receive from him a large sum of money, to wit, the sum of 600*l.* under the pretence of making a recommendation of him the said W. J., to be appointed to a certain place under the appointment, superintendence, and control of the principal officers of Her Majesty's Treasury, against the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

Eighteenth
count.

Precedents.

No. II.
Indictment
under 49 Geo. 3,
c. 126, for
trafficking in
appointments to
public offices.
Nineteenth
count.

Nineteenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took of and from the said W. J. a promise of and contracted and agreed with the said W. J. to receive from him a certain large sum of money, to wit, the sum of 600*l*. for the interest, solicitation, recommendation, and negotiation of him the said T. W. S., to be made in and about the procuring the nomination and appointment of him the said W. J. to a certain place under the appointment, superintendence, and control of the principal officers of Her Majesty's Treasury, against the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

Twentieth
count.

Twentieth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. W. S., afterwards and after the said 20th day of June, in the year of our Lord 1809, to wit, on the 18th day of March, in the year of our Lord, 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, took a promise of and contracted and agreed with the said W. J. to receive from him a certain large sum of money, to wit, the sum of 600*l*, under the pretence of making and causing to be made interest, solicitation, recommendation, and negotiation in and about procuring the nomination and appointment of him the said W. J. to a certain place under the appointment, superintendence, and control of the principal officers of Her Majesty's Treasury, against the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

No. III.

Indictment for Libel, and a Plea of Justification under Lord Campbell's Act. (a)

No. III.
Indictment for a
libel, and a plea
of justification
under Lord
Campbell's Act.

CITY and County of the City of Exeter, } The jurors for our Lady
to wit. } the Queen upon their
oath present, that before and at the time of publishing the false, scandalous, malicious, and defamatory libel hereinafter mentioned, Henry Phillpotts had become and was and still is, by Divine permission, Lord Bishop of Exeter, to wit, bishop of the diocese of Exeter, in that part of the United Kingdom of Great Britain and Ireland called England, and that before the time of the publishing of the said false, scandalous, malicious, and defamatory libel hereinafter mentioned, to wit, on the 1st day of May, in the year of our Lord 1846, a certain petition of one James Shore, to the Lords Spiritual and Temporal of the United Kingdom of

(a) The following were the pleadings in the famous case of the Prosecution of the Proprietor of the *Western Times*, by the Bishop of Exeter, for a libel. They were settled by eminent counsel on both sides, and will be valuable, as precedents that have been subjected to the keenest scrutiny, and found to be unimpeachable.

Great Britain and Ireland in Parliament assembled, had been and was presented by a certain peer of the realm, to wit, by Henry, Lord Brougham and Vaux, to the said Lords Spiritual and Temporal in Parliament assembled; and that the said Henry, Lord Brougham and Vaux did, to wit, on the day and year aforesaid, and on the occasion of the said presenting the said petition to the said Lords Spiritual and Temporal, address and make to the said Lords Spiritual and Temporal in Parliament assembled certain observations with reference to and concerning the said petition and the several matters and things in the said petition contained; and that the said Henry, Bishop of Exeter, then being one of the said Lords Spiritual, did, on the day and year aforesaid, and on the occasion aforesaid, address and make to the said Lords Spiritual and Temporal in Parliament assembled certain observations and statements, in answer and with reference to the said observations of the said Henry, Lord Brougham and Vaux, and with reference to the said matters and things contained in the said petition of the said James Shore. And the jurors aforesaid, on their oath aforesaid, do further present, that Thomas Latimer, of the parish of Saint John, in the city and county of the city aforesaid, labourer, well knowing the premises, but contriving and wickedly, maliciously, and unlawfully intending to aggrieve and vilify the said Henry, Bishop of Exeter, and to injure him in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, in his diocese, and among the clergy of his said diocese, and the other clergy of this realm, and also among his neighbours and other good and worthy subjects of this realm, afterwards, to wit, on the 24th day of July, in the year of our Lord 1846, with force and arms, at the parish aforesaid, in the city and county of the city aforesaid, in a certain newspaper called, to wit, *The Western Times*, falsely, wickedly, and maliciously did write and publish and cause and procure to be written and published, a certain false, wicked and malicious, scandalous and defamatory libel, of and concerning the said Henry, Bishop of Exeter, and of and concerning him as such bishop as aforesaid, and of and concerning the matters and things aforesaid, in the words and figures following, that is to say, "Bishop Phillpotts." (Then follows the libel) concluding thus, "unfortunately he (meaning thereby the said Henry, Bishop of Exeter) goes quite the other way, and his (meaning thereby the said Henry, Bishop of Exeter) reply is so directly the opposite of the truth, that he (meaning thereby the said Henry, Bishop of Exeter) stands branded as a consecrated, careless perverter of facts, and one who does no credit to the mitre which he (meaning thereby the said Henry, Bishop of Exeter) is paid 200*l.* a week, or thereabouts, to wear," &c., knowing the same to be false, &c. *contra pacem*, &c.

Precedents.

No. III.

Indictment for a libel, and a plea of justification under Lord Campbell's Act.

Indictment.

Hilary Term, 10th Vict.

Plea First.—And now, that is to say, on the 11th day of January, in this same term, before our said Lady the Queen, at Westminster, cometh the said Thomas Latimer, by Thomas Baker, his attorney, and having heard the said indictment read, saith he is not guilty of the said premises in the said indictment above specified and charged upon him, and of this the said Thomas Latimer puts himself upon the country, &c.

Plea Second.—And for a further plea in this behalf to so much of the first and fourth counts of the said indictment, as charged upon the said Thomas Latimer the writing and publishing and causing and procuring

Precedents.
 No. III.
 Indictment for a
 libel, and a plea
 of justification
 under Lord
 Campbell's Act.

Second Plea.

to be written and published so much of the said alleged libels in the said first and fourth counts respectively mentioned, as imputes to or charges against Henry, Lord Bishop of Exeter, therein respectively also mentioned, that the reply of him the said Henry, Lord Bishop of Exeter, to the observations of Henry, Lord Brougham and Vaux in the said first and fourth counts respectively mentioned, in reference to the petition of James Shore therein also respectively mentioned, was so directly opposite to the truth that the said Henry, Lord Bishop of Exeter, stands branded as a careless perverter of facts, the said Thomas Latimer by virtue of the statute in such case made and provided says, that before the writing and publishing of, and causing and procuring to be written and published, so much of the said alleged libels respectively as is in the introductory part of this plea mentioned, to wit, on the 12th day of September, in the year of our Lord 1832, the most noble Edward Adolphus, Duke of Somerset, then and thenceforth and until and at the time of the writing and publishing of, and causing and procuring to be written and published, so much of the said alleged libels as last aforesaid, and still being a peer of the realm of the United Kingdom of Great Britain and Ireland, to wit, Duke of Somerset and Baron Seymour of Hacke, in the county of Somerset, had erected and built, at his own expense, a certain chapel for the public worship of God, on certain lands of him the said Edward Adolphus, Duke of Somerset, situate in the hamlet of Bridgetown, in the parish of Berry Pomeroy, in the county of Devon, and in the said diocese of Exeter, in the said first and fourth counts respectively mentioned, to wit, at the said parish in the said first and fourth counts respectively mentioned. And the said Thomas Latimer further saith that afterwards and before the writing and publishing of, and causing and procuring to be written and published, so much of the said alleged libels as aforesaid, to wit, on the day and year last aforesaid, the said Edward Adolphus, Duke of Somerset, with the consent of the Reverend John Edwards, Clerk, then being the vicar of the said vicarage and parish church, applied to and requested the said Henry, Lord Bishop of Exeter, then being Lord Bishop of the said diocese of Exeter, and the ordinary of the said vicarage and parish church, to grant his licence, that the said chapel might be opened and used for the celebration of Divine service according to the rites and ceremonies of the United Church of England and Ireland by public authority established, to wit, at the said parish in the said first and fourth counts respectively in that behalf mentioned. And the said Henry, Lord Bishop of Exeter then, on such request of the said Edward Adolphus, Duke of Somerset, being so made to him as aforesaid, stated to the said Edward Adolphus, Duke of Somerset, that he the said Henry, Lord Bishop of Exeter, was willing to grant such licence as aforesaid, provided the said Edward Adolphus, Duke of Somerset, would, previously to the granting thereof, engage and undertake with and to him, the said Henry, Lord Bishop of Exeter, that he, the said Edward Adolphus, Duke of Somerset, would, to the satisfaction of him the said Henry, Lord Bishop of Exeter, endow the said chapel with a permanent provision for the maintenance of a minister in holy orders to celebrate such Divine service as aforesaid; and would convey and assure the said land whereon the said chapel was built as aforesaid, and also the said chapel so and in such manner that the said chapel might be for ever devoted and set apart to and for such Divine service as last aforesaid; and that the said chapel should, in the mean time and until such endowment and conveyance and assurance as aforesaid, only be used for purposes connected with the

ministry of the said United Church of England and Ireland, to wit, at the parish aforesaid. And the said Thomas Latimer further saith that afterwards and before the granting of the licence to the said Edward Adolphus, Duke of Somerset, by the said Henry, Lord Bishop of Exeter, as hereinafter mentioned, to wit, on the 22nd day of September, in the year of our Lord one thousand eight hundred and thirty-two, and thenceforth always until the granting of such licence, the said Edward Adolphus, Duke of Somerset, declined to enter into or give any such engagement or undertaking with and to the said Henry, Lord Bishop of Exeter, as aforesaid; And the said Henry, Lord Bishop of Exeter thereupon, then, to wit, on the day and year last aforesaid, consented to grant such licence as aforesaid to the said Henry Adolphus, Duke of Somerset, without requiring him to enter into or give any such engagement or undertaking as aforesaid, to wit, at the parish last aforesaid. And the said Henry, Lord Bishop of Exeter, afterwards and before the writing and publishing of, and causing and procuring to be written and published, so much of the said alleged libels as aforesaid, to wit, on the 9th day of November, in the year of our Lord one thousand eight hundred and thirty-two, in accordance with the consent so given by him as aforesaid, the said Edward Adolphus, Duke of Somerset, having declined and then declining to enter into and give and not theretofore or then or at any time since having entered into or given any such engagement or undertaking as aforesaid, did, by a certain licence there subscribed by him the said Henry, Lord Bishop of Exeter, and sealed with his Episcopal Seal, bearing date a certain day and year in that behalf therein named, to wit, the day and year last aforesaid, give and grant his licence unto the said Edward Adolphus, Duke of Somerset, that the said chapel might be forthwith opened and used for the celebration of Divine service, according to the rites and ceremonies of the said United Church of England and Ireland, by a Priest or Minister in Holy Orders, to be for that purpose licensed by the said Henry, Lord Bishop of Exeter, to wit, at the parish last aforesaid. And the said Thomas Latimer further saith, that afterwards, and before the writing and publishing of, and causing and procuring to be written and published, so much of the said alleged libels as aforesaid, to wit, on the said 1st day of May, in the year of our Lord one thousand eight hundred and forty-six, in the said first and fourth counts respectively mentioned, the said Henry, Lord Bishop of Exeter, did, in reply to the said observations of the said Henry, Lord Brougham and Vaux, in the said first and fourth counts respectively mentioned, in reference to the said petition of the said James Shore, and in the said observations and statements addressed and made by him, the said Henry, Lord Bishop of Exeter, in answer to the said observations of the said Henry, Lord Brougham and Vaux, as therein respectively also mentioned, did speak and say to the said Lords Spiritual and Temporal, in Parliament assembled, of and concerning the said observations and statements of the said Henry, Lord Brougham and Vaux, and of and concerning the said Edward Adolphus, to the said Henry, Lord Bishop of Exeter, for such licence to open and use the same as aforesaid; and of and concerning such licence as last aforesaid; and of and concerning such engagement and undertaking so required by him, the said Henry, Lord Bishop of Exeter, and declined to be entered into and given by the said Edward Adolphus, Duke of Somerset, as aforesaid; and of and concerning the said petition of the said James Shore, and the matters therein contained; and of and concerning the premises, the

Precedents.

No. III.

Indictment for a libel, and a plea of justification under Lord Campbell's Act.

Precedents.

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Indictment for a
libel, and a plea
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under Lord
Campbell's Act.

words following, that is to say, "I" (meaning himself, the said Henry, Lord Bishop of Exeter), "should wish to have been excused from entering into the circumstances of the present case" (meaning the said matters and things contained in the petition of the said James Shore, as aforesaid) "but my noble and learned friend" (meaning the said Henry, Lord Brougham and Vaux) "has stated several matters" (meaning the said matters stated by the said Henry, Lord Brougham and Vaux), "in his said observations in reference to the said petition of the said James Shore, which cannot be left unanswered. It is certainly true the noble Duke alluded to" (meaning the said Edward Adolphus, Duke of Somerset), "built the chapel in question," (meaning the said chapel hereinbefore mentioned, at Bridgetown, meaning the said hamlet of Bridgetown, in the parish of Berry Pomeroy aforesaid); "and some years ago the noble Duke" (meaning the said Edward Adolphus, Duke of Somerset,) "applied to me" (meaning himself, the said Henry, Lord Bishop of Exeter) "to consecrate it" (meaning the said chapel). "Several communications" (meaning the said request of the said Edward Adolphus, Duke of Somerset, for the said licence to open and use the said chapel, and the said requisitions of him, the said Henry, Lord Bishop of Exeter, that the said Edward Adolphus, Duke of Somerset, should enter into and give such undertaking and engagement as aforesaid) "had passed between himself" (meaning himself, the said Henry, Lord Bishop of Exeter) "and the noble Duke" (meaning the said Edmund Adolphus, Duke of Somerset), "and finally I" (meaning himself, the said Henry, Lord Bishop of Exeter) "consented to license the chapel" (meaning the chapel aforesaid), "the Duke" (meaning the said Edward Adolphus, Duke of Somerset) "undertaking to endow it" (meaning the said chapel), "in order to its being consecrated" (meaning in order to the said chapel being consecrated). "And that meanwhile it should only be used for purposes connected with the ministry of the Protestant Established Church" (meaning the said United Church of England and Ireland, by public authority established), "both of which engagements I" (meaning himself, the said Henry, Lord Bishop of Exeter), "regret to state have been violated by the noble Duke" (meaning the said Edward Adolphus, Duke of Somerset), "for reasons which, doubtless, are satisfactory to his own mind" (meaning the mind of the said Edward Adolphus, Duke of Somerset), "though I" (meaning himself, the said Henry, Lord Bishop of Exeter) "cannot even guess what they are," to wit, at the parish last aforesaid. And the said Thomas Latimer further saith, that it was for the public benefit that so much of the said alleged libels in the said first and fourth counts respectively mentioned, as in the introductory part of this plea mentioned, should be published, by reason that it is for the public benefit that when statements opposite of the truth and perversion of facts are made by a person filling a high public office, to wit, of Bishop of the said United Church of England and Ireland, of and concerning the character and conduct, and to the prejudice and discredit, of another person standing in a high and important public position, to wit, a peer of the realm of the said United Kingdom of Great Britain and Ireland, that the truth in respect of the matters stated should be published and made to appear, so that the liege subjects of our Lady the Queen may not thereby be misled, or be induced to form an erroneous or ill-founded opinion respecting the character and conduct of such person as last aforesaid, to wit, at the parish last aforesaid.

Wherefore he the said Thomas Latimer, at the said several times, &c..

in the said first and fourth counts in that behalf respectively mentioned, at the said parish therein also in that behalf respectively mentioned, wrote and published, and caused and procured to be written and published, so much of the said alleged libels, in the said first and fourth counts respectively mentioned, as imputes to or charges against the said Henry, Lord Bishop of Exeter, that the said reply of him the said Henry, Lord Bishop of Exeter, to the said observations of the said Henry, Lord Brougham and Vaux, in reference to the said petition of the said James Shore, was so directly opposite of the truth, that the said Henry, Lord Bishop of Exeter, stands branded as a careless perverter of facts, as he the said Thomas Latimer, lawfully might, for the cause aforesaid, which are the same writing and publishing as are in the said first and fourth counts respectively, and in the introductory part of this plea, mentioned. And this the said Thomas Latimer is ready to verify, &c. Wherefore he prays judgment if our said Lady the Queen will or ought further to impeach him of and concerning the premises in the introductory part of this plea mentioned; and that he the said Thomas Latimer may be dismissed and discharged of the Court here of and concerning the premises last aforesaid.

Precedents.

No. III.
Indictment for a
libel, and a plea
of justification
under Lord
Campbell's Act.

Hilary Term, 10th Vict.

Replication First.—And whereupon Charles Francis Robinson, Esq., First Coroner and Attorney of our said Lady the Queen, in the Court of our said Lady the Queen, before the Queen herself, who prosecuteth for our said Lady the Queen in this behalf, being present here in Court, and having heard the said plea of the said Thomas Latimer, by him first above pleaded in bar, and whereof the said Thomas Latimer hath put himself upon the country, for our said Lady the Queen doth the like.

replication.

Second.—And as to the plea of the said Thomas Latimer by him secondly above pleaded, the said Coroner and Attorney of our said Lady the Queen, in the Court of our said Lady the Queen, before the Queen herself, who prosecuteth for our said Lady the Queen in this behalf, being present here in Court, having here the said plea of the said Thomas Latimer, by him secondly above pleaded in bar, for our said Lady the Queen saith, that for anything by the said Thomas Latimer in his said second plea alleged, our said Lady the Queen ought not to be barred from prosecuting the said indictment against the said Thomas Latimer of and concerning the premises in the introductory part of the said second plea mentioned, because he says that the said Thomas Latimer, of his own wrong and without the cause and matter of defence in his said second plea alleged, falsely, wickedly and maliciously wrote and published, and caused to be written and published, so much of the said alleged libels in the said first and fourth counts respectively mentioned, as is in the introductory part of the second plea mentioned, in manner and form as in the said first and fourth counts of the said indictment is alleged. And this the said Coroner and Attorney prays may be inquired of by the country, &c. And the said Thomas Latimer doth the like.

*Second
replication.*

No. IV.

Indictment under the 7 & 8 Vict. c. 22, for feloniously transposing Goldsmiths' Marks.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present, that R. G.,
late of the parish of Saint Giles in the Fields, in the county of Middlesex, labourer, heretofore and after the 1st day of October, in the year of our Lord 1844, to wit, on the 1st day of May, in the year of our Lord 1848, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully, feloniously, knowingly and wilfully did transpose a certain mark of a certain die theretofore, to wit, on the day and year last aforesaid, to wit, at the parish of St. John Zachary, in the city of London, used by the Company of Goldsmiths in London, for the marking of silver wares, to wit, a certain mark of the Queen's head, the letter I in the old English character, being the distinct variable mark to denote the year when the ware upon which the said mark was impressed was made, the lion passant and a leopard's head, of a certain die of the Queen's head, and the letter I in the old English character, and the lion passant and the leopard's head from a certain ware of silver, to wit, a silver spoon, to a certain ware of base metal, to wit, to a certain ware called the mounting of a sporran, against the form of the statute in such case made and provided, and against the peace of our Lady the now Queen, her crown and dignity.

Second count.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. G., afterwards and after the said 1st day of October, in the year of our Lord 1844, to wit, on the 1st day of May, in the year of our Lord 1848, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, unlawfully, feloniously, knowingly and wilfully did transpose a certain mark of a certain die theretofore, to wit, on the day and year last aforesaid, at the parish of St. John Zachary, in the city of London, used by the Company of Goldsmiths in London, for the marking of silver wares, to wit, a certain mark of the lion passant, of a certain die of the lion passant, from a certain ware of silver, to wit, a silver spoon, to a certain ware of base metal, to wit, to a certain ware called the mounting of a sporran, against the form of the statute in such case made and provided, and against the peace of our Lady the now Queen, her crown and dignity.

Third count.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. G., afterwards and after the said 1st day of October, in the year of our Lord 1844, to wit, on the 1st day of May, in the year of our Lord 1848, in the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, unlawfully, feloniously, knowingly and wilfully did transpose a certain mark of a certain die theretofore, to wit, on the day and year last aforesaid, at the parish of St. John Zachary, in the city

of London, and within the jurisdiction of the said court, used by the Company of Goldsmiths in London, for the marking of silver wares, from a certain silver ware, to wit, a silver spoon, to a certain ware of base metal, to wit, to a certain ware of base metal called the mounting of a Highland purse, against the form of the statute in such case made and provided, and against the peace of our Lady the now Queen, her crown and dignity.

Precedents.

No. IV.
Indictment
under the 7 & 8
Vict. c. 22, for
feloniously
transposing
goldsmiths'
marks.

Fourth count.

Fourth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards and after the said 1st day of October, in the year of our Lord 1844, to wit, on the 1st day of May, in the year of our Lord 1848, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, a certain mark of a certain die theretofore, to wit, on the day and year last aforesaid, to wit, at the parish of St. John Zachary, in the city of London, and within the jurisdiction of the said court, used by the Company of Goldsmiths in London, for the marking of silver wares, to wit, a certain mark of the Queen's head, and the letter I in the old English character, and the lion passant and the leopard's head of a certain die of the Queen's head, and the letter I in the old English character, and the lion passant and the leopard's head, was by some person or persons to the jurors unknown, transposed from a certain silver ware, to wit, a silver spoon, to a certain ware of base metal, to wit, a certain ware called the mounting of a sporran. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. G. afterwards and after the said 1st day of October, in the year of our Lord 1844, to wit, on the 1st day of May, in the year of our Lord 1848, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, with force and arms, well knowing the said mark of the said die to have been so transposed from the said silver ware to the said ware of base metal as aforesaid, did unlawfully, feloniously, knowingly and wilfully utter the said ware of base metal, the said mark of the said die so transposed as last aforesaid then and there remaining and being in and upon the said ware of base metal, against the form of the statute in such case made and provided, and against the peace of our Lady the now Queen, her crown and dignity.

Fifth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards and after the said 1st day of October, in the year of our Lord 1844, to wit, on the 1st day of May, in the year of our Lord 1848, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, a certain mark of a certain die theretofore, to wit, on the day and year last aforesaid, to wit, at the parish of St. John Zachary, in the city of London, and within the jurisdiction of the said court, used by the Company of Goldsmiths in London, for the marking of silver wares, to wit, a certain mark of the lion passant of a certain die of the lion passant, was by some person or persons, to the jurors unknown, transposed from a certain silver ware, to wit, a silver spoon, to a certain ware of base metal, to wit, a certain ware called the mounting of a Highland purse. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. G., afterwards and after the said 1st day of October, in the year of our Lord, 1844, to wit, on the 1st day of May, in the year of our Lord 1848, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of

Fifth count.

Precedents. the said court, with force and arms, well knowing the said mark of the said die to have been so transposed from the said silver ware to the said ware of base metal as last aforesaid, did unlawfully, feloniously, knowingly and wilfully utter the said ware of base metal, the said mark of the said die so transposed as last aforesaid then and there remaining and being in and upon the said ware of base metal, against the form of the statute in such case made and provided, and against the peace of our Lady the now Queen, her crown and dignity.

Sixth count. *Sixth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards and after the said 1st day of October, in the year of our Lord 1844, to wit, on the 1st day of May, in the year of our Lord 1848, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, a certain mark of a certain die theretofore, to wit, on the day and year last aforesaid, in the parish of St. John Zachary, in the city of London, and within the jurisdiction of the said court, used by the Company of Goldsmiths in London, for the marking of silver wares, was by some person or persons to the jurors unknown, transposed from a certain silver ware, to wit, a silver spoon, to a certain ware of base metal, to wit, a certain ware called the mounting of a sporran. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. G. afterwards and after the said 1st day of October, in the year of our Lord 1844, to wit, on the 1st day of May, in the year of our Lord 1848, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, well knowing the said mark of the said die to have been so transposed from the said silver ware to the said ware of base metal, as last aforesaid, did unlawfully, feloniously, knowingly and wilfully utter the said ware of base metal, the said mark of the said die so transposed as last aforesaid then and there remaining and being in and upon the said base metal, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Seventh count. *Seventh Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. G., afterwards and after the said 1st day of October, in the year of our Lord 1844, to wit, on the 1st day of May, in the year of our Lord 1848, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, unlawfully, feloniously, knowingly and wilfully did utter a certain mark of a certain die theretofore, to wit, on the day and year last aforesaid, at the parish of St. John Zachary, in the city of London, used by the Company of Goldsmiths in London, for the marking of silver wares, to wit, a certain mark of the Queen's head, and the letter I in the old English character, the said letter being the distinct variable mark to denote the year when the ware on which the said mark was impressed was made, and the lion passant and the leopard's head of a certain die of the Queen's head, and the letter I in the old English character, and the lion passant and the leopard's head used by the Company of Goldsmiths in London, as aforesaid, for the marking of silver wares as aforesaid, the said mark having been theretofore, to wit, on the day and year last aforesaid, to wit, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, transposed from a certain silver ware, to wit, a silver spoon, to a certain ware of base metal, to wit, a certain ware called the mounting of a Highland purse, he the said R. G. at the time he so uttered the mark as aforesaid, then and there,

to wit, on the day and year last aforesaid, at the parish last aforesaid, in the county last aforesaid, well knowing the said mark to have been so transposed as last aforesaid, against the form of the statute in such case made and provided, and against the peace of our Lady the now Queen, her crown and dignity.

Eighth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. G., afterwards and after the said 1st day of October, in the year of our Lord 1844, to wit, on the 1st day of May, in the year of our Lord 1848, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, unlawfully, feloniously, knowingly and wilfully did utter a certain mark of a certain die theretofore, to wit, on the day and year last aforesaid, at the parish of St. John Zachary, in the city of London, used by the Company of Goldsmiths in London, for the marking of silver wares, to wit, the mark of the lion passant, of the die of the lion passant, the said mark having been theretofore, to wit, on the day and year last aforesaid, to wit, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, transposed from a certain silver ware, to wit, a silver spoon, to a certain ware of base metal, to wit, a certain ware called the mounting of a Highland purse, he the said R. G. at the time he so uttered the said mark as aforesaid, then and there, to wit, on the day and year last aforesaid, at the parish last aforesaid, in the county last aforesaid, well knowing the said mark to have been so transposed as last aforesaid, against the form of the statute in such case made and provided, and against the peace of our Lady the now Queen, her crown and dignity.

Ninth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. G., afterwards and after the said 1st day of October, in the year of our Lord 1844, to wit, on the 1st day of May, in the year of our Lord 1848, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, unlawfully, feloniously, knowingly and wilfully did utter a certain mark of a certain die theretofore, to wit, on the day and year last aforesaid, at the parish of St. John Zachary, in the city of London, used by the company of Goldsmiths in London, for the marking of silver wares, the said mark having been theretofore, to wit, on the day and year last aforesaid, to wit, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, transposed from a certain silver ware, to wit, a silver spoon, to a certain ware of base metal, to wit, a certain ware called the mounting of a sporran, he the said R. G. at the time he so uttered the said mark as aforesaid, then and there, to wit, on the day and year last aforesaid, at the parish last aforesaid, in the county last aforesaid, well knowing the said mark to have been so transposed as last aforesaid, against the form of the statute in such case made and provided, and against the peace of our Lady the now Queen, her crown and dignity.

Tenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. G., afterwards and after the said first day of October, 1844, to wit, on the 1st day of May, in the year of our Lord 1848, with force and arms at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, unlawfully, feloniously, knowingly and wilfully, and without any lawful excuse whatsoever, had in his possession a certain ware of base metal, to wit, a certain ware called the mounting of a sporran, having there-

Precedents.

No. IV.
Indictment
under the 7 & 8
Vict. c. 22, for
feloniously
transposing
goldsmiths
marks.
Eighth count.

Ninth Count.

Tenth count.

Precedents.

No. IV.
Indictment
under the 7 & 8
Vict. c. 22, for
feloniously
transposing
goldsmiths'
marks.

upon a certain mark of a certain die used by the Company of Goldsmiths in London, to wit, a certain mark of the Queen's head, and the letter I in the old English character, and the lion passant, and the leopard's head, from a certain die of the Queen's head, and the letter I in the old English character, and the lion passant and the leopard's head, which said mark had been theretofore, to wit, on the day and year last aforesaid, at the parish of St. George, Bloomsbury, in the county of Middlesex, transposed from a certain silver ware, to wit, a silver spoon, to the said ware of base metal, he the said R. G. at the time he so had the said base ware in his possession as last aforesaid, with the said mark thereupon as last aforesaid, then and there, to wit, on the same day and year last aforesaid, at the parish last aforesaid, in the county last aforesaid, and within the jurisdiction of the said court, well knowing that the said mark had been so theretofore transposed thereunto as last aforesaid, against the form of the statute in such case made and provided, and against the peace of our Lady the now Queen, her crown and dignity.

Eleventh count.

Eleventh Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. G., afterwards and after the said 1st day of October, 1844, to wit, on the 1st day of May, in the year of our Lord 1848, with force and arms at the parish last aforesaid, in the county last aforesaid and within the jurisdiction of the said court, unlawfully, feloniously, knowingly and wilfully had in his possession a certain ware of base metal, to wit, a certain ware called the mounting of a Highland purse, having thereupon a certain mark of a certain die theretofore, to wit, on the day and year last aforesaid, at the parish of St. John Zachary, in the city of London, used by the Company of Goldsmiths in London, to wit, the mark of the lion passant, of the die of the lion passant, which said last-mentioned mark had been theretofore, to wit, on the day and year last aforesaid, at the parish of St. George, Bloomsbury, in the county of Middlesex, transposed from a certain ware of silver, to wit, a silver spoon, unto the said ware of base metal, he the said R. G. at the time he so had the said ware in his possession as last aforesaid, then and there, to wit, on the same day and year last aforesaid, at the parish last aforesaid, in the county last aforesaid, and within the jurisdiction of the said court, well knowing that the said mark had been theretofore so transposed thereunto as last aforesaid, against the form of the statute in such case made and provided, and against the peace of our Lady the now Queen, her crown and dignity.

Twelfth count.

Twelfth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. G., afterwards and after the said 1st day of October, 1844, to wit, on the 1st day of May, in the year of our Lord 1848, with force and arms at the parish last aforesaid, in the county last aforesaid, and within the jurisdiction of the said court, unlawfully, feloniously, knowingly and wilfully had in his possession a certain ware of base metal, to wit, a certain ware called the mounting of a sporran, then and there having thereupon a certain mark of a certain die theretofore used by the Company of Goldsmiths in London, to wit, on the day and year last aforesaid, at the parish of St. John Zachary, in the city of London, and within the jurisdiction of the said court, which said last-mentioned mark had been theretofore, to wit, on the day and year last aforesaid, at the parish of St. George, Bloomsbury, in the county of Middlesex, transposed from a certain ware of silver, to wit, a silver spoon, unto the said ware of base metal, he the said R. G. at the time he so had the said ware in his possession with the said last-men-

tioned mark thereupon as last aforesaid, then and there, to wit, on the same day and year last aforesaid, to wit, at the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said court, well knowing that the said mark had been theretofore so transposed thereunto as last aforesaid, against the form of the statute in such case made and provided, and against the peace of our Lady the now Queen, her crown and dignity.

Thirteenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. G., afterwards and after the said 1st day of October, in the year of our Lord 1844, to wit, on the 1st day of May, in the year of our Lord 1848, with force and arms at the parish last aforesaid, in the county last aforesaid, and within the jurisdiction of the said court, unlawfully, feloniously, knowingly and wilfully did cut and sever from a certain ware of silver, to wit, a silver spoon, a certain mark of a certain die used by the company of Goldsmiths in London, to wit, on the day and year last aforesaid, at the parish of Saint John Zachary, in the city of London, to wit, the distinct variable mark or letter to denote the year in which such last-mentioned ware had been made, with intent that such mark should be placed upon or joined or affixed to a certain ware of base metal, to wit, to the mounting of a sporran, against the form of the statute in such case made and provided, and against the peace of our Lady the now Queen, her crown and dignity.

Precedents.
No. IV.
Indictment
under the 7 & 8
Vict. c. 22, for
feloniously
transposing
goldsmiths
marks.
Thirteenth
count.

No. V.

Indictment for obtaining Money on a False Representation respecting the Value and History of a Horse which the Prisoners sold to the Prosecutor.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present, that heretofore,
to wit, at the time of the commission of the offence hereinafter in this count mentioned, one R. J. T. was desirous of purchasing and providing himself with a horse which should be sound and quiet in harness, and that J. P. B. late of the parish of St. James, Westminster, in the county of Middlesex, and within the jurisdiction of the said court, labourer, and J. P. late of the same place, labourer, well knowing the premises, and that the said R. J. T. would be ready to purchase of and from any respectable and responsible person such horse as aforesaid; and the said J. P. B. and J. P. having in their possession a certain horse, much under the value of 36*l.* 15*s.*, to wit, of the value of 5*l.* and no more, and then being unsound, and the said J. P. B. and J. P. wickedly and fraudulently intending to persuade the said R. J. T. to deposit with them the said J. P. B. and J. P. a large sum of money upon the delivery of the said horse to the said R. J. T. for trial and approval thereof, and under colour of their readiness and willingness to return the said money, subject to the deduction of 1*l.* (in case the said horse should not be approved of) by the said R. J. T., to cheat and defraud the said R. J. T. of the same money, so to be deposited as aforesaid, on the 7th day of September, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did produce the said horse to the said R. J. T. and did then and there unlawfully, knowingly and designedly, falsely pretend to the said R. J. T. that he the

Precedents.
No. V.
Indictment for
obtaining
money on a false
representation.

said J. P. B. then was in the wool business in the city of London ; that the said horse then belonged to a brother of him the said J. P. B. then abroad ; that he the said J. P. B. then had to sell the said horse for his said brother ; that the said horse was then perfectly sound and quiet in harness, and had then been used to run with another horse in harness, which had been sold to a colonel. By means of which said false pretences they the said J. P. B. and J. P. did then and there unlawfully, knowingly and designedly, fraudulently obtain of and from the said R. J. T. one piece of paper of the value of one penny, of the goods and chattels of the said R. J. T. and one order for the payment of money, to wit, for the payment of the sum of 36*l.* 15*s.* and of the value of 36*l.* 15*s.* then being the property of the said R. J. T., with intent to cheat and defraud him of the said goods, chattels and order respectively, the said sum of money payable and secured by and upon the said order being then due and unsatisfied to the said R. J. T. the proprietor of the said order ; whereas in truth and in fact the said J. P. B. was not then in the wool trade, in the city of London ; and whereas in truth and in fact the said horse did not belong to a brother of him the said J. P. B. who was abroad ; and whereas in truth and in fact he the said J. P. B. had not then to sell the said horse for his said supposed brother ; and whereas in truth and in fact the said horse was not then sound or quiet in harness, and had not then been used to run with another horse which had been sold to a colonel ; all of which said false pretences they the said J. P. B. and J. P. at the time of making thereof as aforesaid, well knew to be false, to the great damage and deception of the said R. J. T. against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Second count.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. P. B., and J. P., well knowing as in the first count mentioned, and having in their possession the said horse in the first count mentioned, and being persons of no credit or responsibility, but of fraudulent and deceitful minds and dispositions, and intending to cause it to appear to, and be believed by, the said R. J. T. that he the said J. P. B. was a person of substance and of good credit, and was a *bonâ fide* seller of the said horse for another, and a respectable party, and was a responsible person, whose warranty of the said horse was of value, and would be available to any purchaser of the said horse, and to induce the said R. J. T. to purchase the said horse of them the said J. P. B. and J. P. upon the faith and credit of the warranty of the said horse by him the said J. P. B. as such responsible party, for a large sum of money, to wit, the sum of 36*l.* 15*s.*, and to cheat and defraud the said R. J. T. of the same, and afterwards, to wit, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did produce the said horse to the said R. J. T. and offer to sell the same to him the said R. J. T., to wit, for the sum of 36*l.* 15*s.*, with a warranty by him the said J. P. B. of the said horse being then sound and quiet in harness ; and the said J. P. B. and J. P. did then and there deliver such warranty as aforesaid to the said R. J. T. and did then and there unlawfully, knowingly and designedly, falsely pretend to the said R. J. T. that he the said J. P. B. then was in the wool business in the city of London, that the said horse then belonged to a brother of the said J. P. B. who was then abroad, and that he the said J. P. B. then had

to sell the said horse for his said brother, by means of which said false pretences, in this count mentioned, they the said J. P. B. and J. P. did, then and there unlawfully, knowingly and designedly, fraudulently obtain of and from the said R. J. T. one piece of paper of the value of one penny, of the goods and chattels of the said R. J. T., and one order for the payment of money, to wit, for the payment of the sum of 36*l.* 15*s.*, then being the property of the said R. J. T. with intent to cheat and defraud the said R. J. T. of the said last-mentioned goods, chattels and order respectively (the said sum of money payable and secured by and upon the said last-mentioned order being then due and unsatisfied to the said R. J. T. the proprietor thereof), whereas in truth and in fact the said J. P. B. was not then in the wool business in the city of London, nor did the said horse belong to a brother of him the said J. P. B. who was then abroad; and whereas in truth and in fact the said J. P. B. had not then to sell the said horse for his said supposed brother; all of which said several false pretences, in this count mentioned, they the said J. P. B. and J. P. at the time of the making thereof as aforesaid knew to be false, to the great damage and deception of the said R. J. T. and against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Precedents.

No. V.

Indictment for obtaining money on a false representation.

STATUTES AND PARTS OF STATUTES
RELATING TO THE CRIMINAL LAW.

POST-OFFICE.

11 & 12 VICT. CAP. 88.

An Act for further regulating the Money Order Department of the Post-office.—[31st August, 1848.]

Penalty on officers of the Post-office issuing money orders with fraudulent intent.

In indictments it shall be sufficient to name "Her Majesty's Postmaster-General."

Printed copies of the *London Gazette* to be evidence.

Act to be deemed a Post-office act.

Sect. IV. **T**HAT every officer of the Post-office who shall grant or issue any money order with a fraudulent intent shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall, at the discretion of the court, either be transported beyond the seas for the term of seven years, or be imprisoned for any term not exceeding three years.

V. And for the more effectual prosecution of offenders, be it enacted, that in any indictment or criminal letters for any felony or misdemeanor committed or attempted to be committed in, upon, or with respect to the Post-office or the Post-office revenue, or in, upon, or with respect to any property, moneys, money orders, goods, chattels, or effects, under the management or control of the Postmaster-General; or where any act, matter, or thing shall have been done or committed by any person with or for any malicious, injurious, or fraudulent design, intent, or purpose, in anywise relating to or concerning the Post-office, or the Post-office revenue, or any such property, moneys, money orders, goods, chattels, or effects as aforesaid, or the Postmaster-General, it shall be sufficient to lay any such property in, and to state or allege the same to belong to, and to state or allege any such act, matter, or thing to have been done or committed with intent to injure or defraud "Her Majesty's Postmaster-General;" and in all indictments and criminal letters relating to or in anywise concerning the department of the Post-office, it shall be sufficient to name and describe the Postmaster-General as "Her Majesty's Postmaster-General," without any further or other name, addition, or description whatsoever.

VII. That any printed copy of the *London Gazette*, purporting to be printed and published by the person or persons having authority to print and publish the same, shall be admitted as evidence by all courts, judges, justices, and others in any part of Her Majesty's dominions of any treasury warrant, and of any regulations or restrictions which shall be issued or made under or by virtue of this act, and contained in any such *Gazette*, and of the due issuing thereof, and of the contents of any such warrant, regulations, or restrictions, without any further or other proof.

VIII. That this act shall be deemed and taken to be a Post-office act, and that the several terms and expressions used in this act shall be construed according to the respective interpretations contained or referred to in the said act passed in the fourth year of the reign of her present Majesty, so far as those interpretations are not repugnant to the subject or inconsistent with the context of such terms and expressions.

FORGERY OF SEAL OF ENROLMENT OFFICE.

11 & 12 VICT. CAP. 94.

An Act to regulate certain Offices in the Petty Bag in the High Court of Chancery, the Practice of the Common Law Side of that Court, and the Enrolment Office of the said Court.—[31st August, 1848.]

sect. XVI. **T**HAT the clerk of the said Enrolment Office, or his deputy or assistant, shall, upon request, and payment of the proper fees payable in respect thereof, indorse or write upon every specification, instrument, and document which at any time heretofore has been or at any time hereafter shall be enrolled in the said Enrolment Office, a certificate that such specification, instrument, or document has been or was enrolled in Chancery, and the day on which such enrolment was made, and shall cause such certificate to be sealed or stamped with the said seal of the Chancery Enrolment Office; and every such certificate purporting or appearing to be so sealed or stamped shall be admitted and received in evidence by all courts and other tribunals, judges, justices, and others, without further proof, and as sufficient *prima facie* evidence that the specification, document, or instrument herein mentioned was duly enrolled in the Court of Chancery on the day and at the time mentioned in such certificate.

Certificates of enrolment to be given, and, when sealed, shall be admitted as evidence.

XVII. That every document or writing sealed or stamped, or purporting or appearing to be sealed or stamped with the said seal of the Chancery Enrolment Office, and purporting to be a copy of any enrolment or other record, or of any other document or writing of any description whatsoever, including any drawings, maps, or plans thereunto annexed or indorsed thereon, shall be deemed to be a true copy of such enrolment, record, document, or writing, and of such drawing, map, or plan (if any) thereunto annexed, and shall, without further proof, be admissible and admitted in evidence, as well before either House of Parliament as also before any committee thereof, and also by and before all courts, tribunals, judges, justices, officers, and other persons whomsoever, in like manner and to the same extent and effect as the original enrolment, record, document, or writing could or might be admissible or admitted in evidence, as well for the purpose of proving the contents of such enrolment, record, document, or writing, and the drawing, map, or plan (if any) thereunto annexed, as also proving such enrolment, record, document, or writing to be an enrolment, record, document, or writing of or belonging to the said Court of Chancery, and that such enrolment, record, document, or writing was made, acknowledged, prepared, filed, or entered on the day and at the time when the original enrolment, record, document, or writing shall purport to have been made, acknowledged, prepared, filed, or entered.

Copies of enrolments stamped with seal of Enrolment Office to be admitted in evidence.

XVIII. That if any person shall falsely make, forge, or counterfeit any seal made, provided, used, or kept in pursuance of this act for or in the said court or any office thereof, or shall falsely make or alter any seal, so as to resemble, purport, or appear to be a seal made, provided, used, or kept in pursuance of this act, or for or in the said court or any office thereof, or shall use or tender in evidence, or utter any impression made

Punishment for forging or altering any seal or document.

11 & 12 Vict. c. 94

*Forgery of Seal
of Enrolment
Office.*

by any seal so falsely made, forged, counterfeited, or altered as aforesaid, knowing the same to have been so falsely made, forged, counterfeited, or altered as aforesaid, or shall forge or shall unlawfully and falsely make or alter any writ, record, document, instrument, proceeding, or writing, or belonging to or made or prepared in or issuing out of, or appearing, or purporting to be of or belonging to, or made or prepared in or issuing out of any such office as aforesaid, or out of the said Court of Chancery, or shall use or tender in evidence or utter any writ, record, document, instrument, proceeding, or writing, so unlawfully or falsely made or altered as aforesaid, knowing the same to have been so unlawfully or falsely made or altered, or shall unlawfully and falsely seal or stamp with any seal made, prepared, kept, or used for or in any of the said offices, or for or in the said Court of Chancery, any writ, record, document, instrument, proceeding, or writing, purporting or appearing to be or resembling, or intended to purport or appear to be or resemble, a writ, record, document, instrument, proceeding, or writing, of or belonging to or made or prepared in, or issuing out of any of the said offices or the said Court of Chancery, or shall fraudulently use or tender in evidence, or utter any writ, record, document, instrument, proceeding, or writing, so unlawfully or falsely sealed or stamped as aforesaid, then and in every such case every person so offending, and every person knowingly and willingly aiding, abetting, or assisting any person in committing any such offence, and being thereof lawfully convicted, shall be adjudged guilty of felony.

LARCENY ACTS AMENDMENT.

12 VICT. CAP. 11.

An Act to amend the Laws in England and Ireland relative to Larceny and other Offences connected therewith.—[3rd April, 1849.]

WHEREAS by an act passed in the eighth year of king George the Fourth, intituled *An Act for consolidating and amending the Laws in England relative to Larceny and other Offences connected therewith*, it was among other things enacted, that every person convicted of simple larceny, or of any felony thereby made punishable like simple larceny, should (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be otherwise punished as by the said act provided : and whereas by an act passed in the ninth year of king George the Fourth, intituled *An Act for consolidating and amending the Laws in Ireland relative to Larceny and other Offences connected therewith*, it was among other things enacted, that every person convicted of simple larceny, or of any felony thereby made punishable like simple larceny, should (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be otherwise punished as by the same act provided ; and whereas it is expedient to abolish the punishment of transportation for the offence of simple larceny and for felonies by the said acts made punishable like simple larceny : be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the first day of May, one thousand eight hundred and forty-nine so much of the recited provisions of the said acts respectively as makes any person convicted of simple larceny, or of any felony by such acts respectively made punishable like simple larceny (except in the cases hereinafter otherwise provided for), liable to be transported beyond the seas for the term of seven years, shall be repealed, but every person so convicted shall be liable, at the discretion of the court, to be otherwise punished as by the said acts respectively is provided.

Punishment of transportation taken away in the case of simple larceny.

II. Provided always, and be it enacted, that if any person shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him, or her, or her husband, in case the value of the article or articles stolen shall exceed the sum of five pounds, every such offender, being convicted thereof, shall be liable to be punished as if this act had not been passed.

Tenants and lodgers stealing from houses or apartments let to them, if the value exceed 5*l.*, punishable as before the passing of the act.

III. Provided also, and be it enacted, that where any person has been twice convicted of any of the offences punishable upon summary conviction under the provisions contained in the said recited acts, or an act of the eleventh year of Her Majesty, intituled *An Act for the more*

Larceny, &c. after two previous summary convictions punishable as

12 Vict. c. 11.

*Larceny Acts
Amendment.*

before the pass-
ing of this act.

10 & 11 Vict.
c. 82.

11 & 12 Vict.
c. 59.

7 & 8 Geo. 4,
c. 30.

9 Geo. 4, c. 56.

In indictments
against persons
twice convicted
it shall be suffi-
cient to state
the fact, and
certified copies
of convictions
to be evidence.

speedy Trial and Punishment of Juvenile Offenders, or an act of the twelfth year of Her Majesty, intituled *An Act for the more speedy Trial and Punishment of Juvenile Offenders in Ireland*, or an act of the eighth year of king George the Fourth, intituled *An Act for consolidating and amending the Laws in England relative to malicious Injuries to Property*, or an act of the ninth year of king George the Fourth, intituled *An Act for consolidating and amending the Laws in Ireland relative to malicious Injuries to Property* (whether each of the convictions has been in respect of an offence of the same description or not, and whether such convictions, or either of them, be before or after the passing of this act), if the person so twice convicted shall afterwards commit the offence of simple larceny, or any offence by the said firstly and secondly recited acts respectively made punishable like simple larceny, such offender being committed thereof, shall be liable to be punished as if this act had not been passed.

IV. And be it enacted, that in any indictment against any person who shall have been twice convicted of offences punishable upon summary conviction as aforesaid it shall be sufficient to state that such person was at certain times and places so twice convicted as aforesaid, without otherwise describing the offences of which such person was so convicted as aforesaid, and a copy of any such conviction, certified by the proper officer of the court of General or Quarter Sessions to which such conviction shall have been transmitted or returned, or proved to be a true copy, shall be sufficient evidence to prove such conviction, and such conviction shall be presumed to be unappealed against unless the contrary be shown.

APPENDIX OF PRECEDENTS.

No. VI.

Indictment for Manslaughter against the Driver and Stoker of a Railway Engine, for negligently driving against another Engine, whereby the Deceased met his Death.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present, that S. H.,
late of the parish of Richmond, in the county of Surrey, labourer, and
W. W., late of the same place, labourer, on the 17th day of November,
in the twelfth year of the reign of our Sovereign Lady Queen Victoria,
with force and arms, at the parish aforesaid in the county aforesaid, and
within the jurisdiction of the said court, in and upon one R. P., in the
peace of God and of our Lady the Queen then and there being, feloniously
and wilfully did make an assault. And the jurors aforesaid, upon their
oath aforesaid, further present that, before and on the said 17th day of
November, the said S. H. was employed by a certain body corporate, to
wit, the London and South Western Railway Company, for the purpose
of conducting, driving, managing, and controlling certain locomotive
steam engines belonging to the said London and South Western Railway
Company, and that the said W. W., before and on the day and year
aforesaid, was employed by the said London and South Western Railway
Company, for the purpose of assisting him, the said S. H., in the
conducting, driving, management, and control of such locomotive steam
engines as aforesaid, and that by virtue of such their respective employ-
ments, the said S. H. was, on the day and year aforesaid, at the parish
aforesaid, in the county aforesaid, and within the jurisdiction of the said
court, conducting and driving, and then and there had the management
and control of a certain locomotive steam engine, to and behind which a
certain carriage, called a tender, was then and there attached, and which
said locomotive steam engine and tender were then and there the property
of and belonging to the said London and South Western Railway Com-
pany, and were then and there in and upon a certain side line of railway
leading into and upon a certain main line, to wit, the Richmond Railway,
and the said W. W. was then and there, him the said S. H., in and
about the said conducting, driving, management, and control of the said
locomotive steam engine and tender, aiding and assisting, and that it then
and there became and was the duty of the said S. H. and of the said
W. W., by virtue of their said employment, not to conduct or drive, or
suffer or permit to be conducted or driven, the said locomotive steam
engine and tender from and off the said side line of railway, into, upon,
or across the said main line of railway, in case any train or engine should
be then due, and about to arrive at that part of the said main line of
railway, where the same was joined by the said side line of railway
aforesaid; yet the said S. H. and the said W. W., well knowing the
remises, and well knowing that a certain train, to wit, a train consisting
of a certain other locomotive steam engine with a certain other tender,
and divers, to wit, twenty carriages attached thereto and drawn thereby,
was then and there lawfully travelling and being propelled on and along
the said main line of railway, and was then due and about to arrive at
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12 Vict. c. 11. *speedy Trial and Punishment of Juvenile Offenders*, or an act of the twelfth year of Her Majesty, intituled *An Act for the more speedy Trial and Punishment of Juvenile Offenders in Ireland*, or an act of the eighth year of king George the Fourth, intituled *An Act for consolidating and amending the Laws in England relative to malicious Injuries to Property*, or an act of the ninth year of king George the Fourth, intituled *An Act for consolidating and amending the Laws in Ireland relative to malicious Injuries to Property* (whether each of the convictions has been in respect of an offence of the same description or not, and whether such convictions, or either of them, be before or after the passing of this act), if the person so twice convicted shall afterwards commit the offence of simple larceny, or any offence by the said firstly and secondly recited acts respectively made punishable like simple larceny, such offender being committed thereof, shall be liable to be punished as if this act had not been passed.

Larceny Acts Amendment.

before the passing of this act.

10 & 11 Vict. c. 82.

11 & 12 Vict. c. 59.

7 & 8 Geo. 4, c. 30.

9 Geo. 4, c. 56.

In indictments against persons twice convicted it shall be sufficient to state the fact, and certified copies of convictions to be evidence.

IV. And be it enacted, that in any indictment against any person who shall have been twice convicted of offences punishable upon summary conviction as aforesaid it shall be sufficient to state that such person was at certain times and places so twice convicted as aforesaid, without otherwise describing the offences of which such person was so convicted as aforesaid, and a copy of any such conviction, certified by the proper officer of the court of General or Quarter Sessions to which such conviction shall have been transmitted or returned, or proved to be a true copy, shall be sufficient evidence to prove such conviction, and such conviction shall be presumed to be unappealed against unless the contrary be shown.

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No. VI.

Indictment for Manslaughter against the Driver and Stoker of a Railway Engine, for negligently driving against another Engine, whereby the Deceased met his Death.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present, that S. H.,
late of the parish of Richmond, in the county of Surrey, labourer, and
W. W., late of the same place, labourer, on the 17th day of November,
in the twelfth year of the reign of our Sovereign Lady Queen Victoria,
with force and arms, at the parish aforesaid in the county aforesaid, and
within the jurisdiction of the said court, in and upon one R. P., in the
name of God and of our Lady the Queen then and there being, feloniously
and wilfully did make an assault. And the jurors aforesaid, upon their
oath aforesaid, further present that, before and on the said 17th day of
November, the said S. H. was employed by a certain body corporate, to
wit, the London and South Western Railway Company, for the purpose
of conducting, driving, managing, and controlling certain locomotive
steam engines belonging to the said London and South Western Railway
Company, and that the said W. W., before and on the day and year
aforesaid, was employed by the said London and South Western Railway
Company, for the purpose of assisting him, the said S. H., in the
conducting, driving, management, and control of such locomotive steam
engines as aforesaid, and that by virtue of such their respective employ-
ments, the said S. H. was, on the day and year aforesaid, at the parish
aforesaid, in the county aforesaid, and within the jurisdiction of the said
court, conducting and driving, and then and there had the management
and control of a certain locomotive steam engine, to and behind which a
certain carriage, called a tender, was then and there attached, and which
said locomotive steam engine and tender were then and there the property
of and belonging to the said London and South Western Railway Com-
pany, and were then and there in and upon a certain side line of railway
leading into and upon a certain main line, to wit, the Richmond Railway,
and the said W. W. was then and there, him the said S. H., in and
about the said conducting, driving, management, and control of the said
locomotive steam engine and tender, aiding and assisting, and that it then
and there became and was the duty of the said S. H. and of the said
W. W., by virtue of their said employment, not to conduct or drive, or
suffer or permit to be conducted or driven, the said locomotive steam
engine and tender from and off the said side line of railway, into, upon,
or across the said main line of railway, in case any train or engine should
be then due, and about to arrive at that part of the said main line of
railway, where the same was joined by the said side line of railway
aforesaid; yet the said S. H. and the said W. W., well knowing the
premises, and well knowing that a certain train, to wit, a train consisting
of a certain other locomotive steam engine with a certain other tender,
and divers, to wit, twenty carriages attached thereto and drawn thereby,
was then and there lawfully travelling and being propelled on and along
the said main line of railway, and was then due and about to arrive at

Precedents.

No. VI.
Indictment for
manslaughter
against the
driver and
stoker of a
railway engine,
&c., &c.

that part of the said main line of railway where the same was joined by the side line of railway aforesaid, but disregarding their duty in that behalf, did, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, wilfully and feloniously and with great force and violence, and in a wanton, negligent, and improper manner, and contrary to their said duty in that behalf, and while the said train was so then and there due and about to arrive as aforesaid, conduct and drive, and suffer and permit to be conducted and driven, the said first-mentioned locomotive steam engine and tender from and off the said line of railway, into, upon, and across the said main line of railway, and into, upon, and against the said train so then and there lawfully travelling and being propelled on and along the said main line of railway as aforesaid; and that the said S. H. and the said W. W. did thereby and by means of the said several premises, and by reason of the shock and concussion thereby given and communicated to the said first-mentioned locomotive steam engine, then and there wilfully and feloniously and with great force and violence, push, force, dash, drive, and jam, and cause to be pushed, forced, dashed, driven, and jammed in, upon, over, against, and between a certain part of the said first-mentioned locomotive steam engine, to wit, the hinder part thereof, the said R. P., who was then and there standing and being in and upon the said first-mentioned locomotive steam engine, and did then and there by means of the pushing, forcing, dashing, and driving and jamming aforesaid, wilfully and feloniously inflict and cause to be inflicted in and upon the head, to wit, in and upon the right side of the head of him the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet of him the said R. P., divers mortal wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns, and scalds, he the said R. P., on the day and year aforesaid at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that they the said S. H. and the said W. W., him the said R. P., in the manner and by the means aforesaid, wilfully and feloniously did kill and slay, against the peace of our Lady the Queen, her crown and dignity.

Second count.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. H. and the said W. W. on the day and year aforesaid, with force and arms, at the parish of Richmond, in the county of Surrey, and within the jurisdiction of the said court, in and upon the said R. P., in the peace of God and of our lady the Queen then and there being, feloniously and wilfully did make an assault. And the jurors aforesaid, upon their oath aforesaid, further present, that before and on the day and year aforesaid, the said S. H. was employed by a certain corporate body, to wit, the London and South Western Railway Company, for the purpose of conducting, driving, managing, and controlling certain locomotive steam engines belonging to the said London and South Western Railway Company, and the said W. W., before and on the day and year aforesaid, was employed by the said London and South Western Railway Company for the purpose of assisting him the said S. H., in the conducting, driving, management, and control of such locomotive steam engines as aforesaid, and that by virtue of such their respective employments, he the said S. H., was, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the

jurisdiction of the said court, conducting and driving, and then and there had the management and control of a certain locomotive steam engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam engine and tender were then and there the property of and belonging to the said London and South Western Railway Company, and were then and there in and upon a certain side line of railway, leading into and upon a certain main line of railway, to wit, the Richmond Railway, and that the said W. W. was then and there, him the said S. H., in and about the said conducting, driving, management, and control of the said locomotive steam engine and tender, aiding and assisting, and that it then and there became and was the duty of the said S. H. and of the said W. W., by virtue of their said employment, not to conduct or drive, or suffer or permit to be conducted or driven, the said locomotive steam engine and tender from and off the said side line of railway, into, upon, or across the said main line of railway, in case any train or engine should be then due and about to arrive at that part of the said main line of railway, where the same was joined by the side line of railway aforesaid; yet the said S. H. and the said W. W., well knowing the premises, and well knowing that a certain train, consisting of another locomotive steam engine, with a certain other tender, and divers, to wit, twenty carriages attached thereto and drawn thereby, was then and there lawfully travelling and being propelled on and along the said main line of railway, and was then due and about to arrive at that part of the said main line of railway, where the same was joined by the side line of railway aforesaid, but disregarding their duty in that behalf, did, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, wilfully and feloniously, and with great force and violence, wilfully and in a wanton, negligent, and improper manner, contrary to their said duty in that behalf, and while the said train was so then and there due and about to arrive as aforesaid, conduct and drive, and suffer and permit to be continued and driven the said first-mentioned locomotive steam engine and tender from and off the said side line of railway, into, upon, and across the said main line of railway, and thereby and by reason of the said premises, and of the several negligent and improper conduct of the said S. H., and of the said W. W., the said train so then travelling and being propelled on and along the said main line of railway, did then and there, unavoidably, with great force and violence, strike, run, and impinge against the said first-mentioned locomotive steam engine; and by means of the said several premises, and of the shock and concussion thereby given and communicated to the said first-mentioned locomotive steam engine, the said R. P., who was then and there standing, and being in and upon the said first-mentioned locomotive steam engine, was then and there with great force and violence pushed, forced, dashed, driven, and jammed in, upon, over, and between a certain part of the said first-mentioned locomotive steam engine, to wit, the hinder part thereof; and by means of the said pushing, forcing, dashing, driving, and jamming, then and there were made and inflicted in and upon the head, to wit, in and upon the right side of the head of him the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet of him the said R. P., divers mortal wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns, and scalds, he the said R. P., on the day and

Precedents.

No. VI.

Indictment for manslaughter against the driver and stoker of a railway engine, &c., &c.

Precedents.
 No. VI.
 Indictment for
 manslaughter
 against the
 driver and
 stoker of a
 railway engine,
 &c., &c.
 Third count.

year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died; and so the jurors aforesaid, &c.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said S. H., and the said W. W., on the day and year aforesaid, with force and arms, at the parish of Richmond aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said R. P., in the peace of God and of our lady the Queen then and there being, feloniously and wilfully did make an assault, and that the said S. H. was then and there conducting and driving, and then and there had the management and control of a certain locomotive steam engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam engine and tender were then and there in and upon a certain way, to wit, a certain side line of railway leading into and upon a certain main line of railway, to wit, the Richmond Railway, and that the said W. W. was then and there, him the said S. H., in and about the said conducting, driving, management, and control of the said locomotive steam engine and tender, aiding and assisting; and that it then and there became and was the duty of the said S. H., and of the said W. W., to use all due and proper caution in and about the conducting and driving of the said locomotive steam engine and tender, from and off the said side line of railway in, upon, or across the said main line of railway, yet the said S. H., and the said W. W., well knowing the premises, and not regarding their duty in that behalf, did not, nor would use all due and proper caution in and about the conducting and driving of the said locomotive steam engine and tender, from and off the said side line of railway, in, upon, or across the said main line of railway; but on the contrary thereof, did then and there, wilfully and feloniously, and with great force and violence, and without due and proper caution, and in a negligent and improper manner, and contrary to their said duty in that behalf, conduct and drive the said locomotive steam engine and tender from and off the said side line of railway, into, upon, and across the said main line of railway, and into, upon, and against a certain train, to wit, a train consisting of another locomotive steam engine, with a certain other tender, and divers, to wit, twenty carriages attached thereto, and drawn thereby, which said train was then and there lawfully travelling and being propelled on and along the said main line of railway; and that the said S. H. and W. W. did thereby and by means of the said several premises, and by reason of the shock and concussion thereby given and communicated to the said first-mentioned locomotive steam engine, then and there wilfully and feloniously, and with great force and violence, push, force, dash, drive, and jam, and caused to be pushed, forced, dashed, driven, and jammed in, upon, over, and between a certain part of the said first-mentioned locomotive steam engine, to wit, the hinder part thereof, the said R. P., who was then and there standing, and being in and upon the said first-mentioned locomotive steam engine, and did then and there, by means of the said pushing, forcing, dashing, driving, and jamming, wilfully, and feloniously inflict, and cause to be inflicted, in and upon the head, to wit, in and upon the right side of the head of him the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet, of him the said R. P., divers mortal wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions,

burns, and scalds, he the said R. P., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died; and so the jurors aforesaid, &c.

Fourth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said S. H., and the said W. W., on the day and year aforesaid, with force and arms, at the parish of Richmond aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said R. P., in the peace of God and of our lady the Queen then and there being, feloniously did make an assault, and that the said S. H. was then and there conducting and driving, and then and there had the management and control of a certain locomotive steam engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam engine and tender were then and there in and upon a certain way, to wit, a certain side line of railway, leading into and upon a certain main line of railway, to wit, the Richmond Railway, and that the said W. W. was then and there, him the said S. H., in and about the said conducting, driving, management, and control of the said locomotive steam engine and tender, aiding and assisting, and that it then and there became and was the duty of the said S. H., and of the said W. W., to use all due and proper caution in and about the conducting and driving of the said locomotive steam engine and tender from and off the said side line of railway, in, upon, or across the said main line of railway; yet the said S. H., and the said W. W., well knowing the premises, and not regarding their duty in that behalf, did not, nor would use all due and proper caution in and about the conducting and driving of the said locomotive steam engine and tender, from and off the said side line of railway, in, upon, or across the said main line of railway, but on the contrary thereof, did then and there wilfully and feloniously, and with great force and violence, and without due and proper caution, and in a negligent and improper manner, and contrary to their said duty in that behalf, conduct and drive the said locomotive steam engine and tender, from and off the said side line of railway, into, upon, and across the said main line of railway, and thereby and by reason of the said several premises, and of the said negligent and improper conduct of the said S. H., and of the said W. W., a certain train, to wit, a train consisting of a certain other locomotive steam engine, with a certain other tender, and divers, to wit, twenty carriages attached thereto, and drawn thereby, which said train was then and there lawfully travelling and being propelled on and along the said main line of railway, did then and there inadvertently, with great force and violence, strike, run, and impinge upon and against the said first-mentioned locomotive steam engine, and by means of the said several premises, and of the shock and concussion thereby given and communicated to the said first-mentioned locomotive steam engine, the said R. P., who was then and there standing and being in and upon the said first-mentioned locomotive steam engine, was then and there with great force and violence pushed, forced, dashed, driven, and jammed in, upon, against, over, and between a certain part of the said first-mentioned locomotive steam engine, to wit, the hinder part thereof, and by means of the said pushing, forcing, dashing, driving, and jamming, then and there were made and inflicted in and upon the head, to wit, in and upon the right side of the head of him the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet of him the said R. P., divers mortal

Precedents.

No. VI.
Indictment for
manslaughter
against the
driver and
stoker of a
railway engine,
&c., &c.

Fourth count.

Precedents.

No. VI.
Indictment for
manslaughter
against the
driver and
stoker of a
railway engine,
&c., &c.

Fifth count.

wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns, and scalds, he the said R. P., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died; and so the jurors aforesaid, &c.

Fifth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said S. H., and the said W. W., on the day and year aforesaid, with force and arms, at the parish of Richmond aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said R. P., in the peace of God and of our said lady the Queen then and there being, feloniously and wilfully did make an assault; and that the said S. H., and the said W. W., a certain locomotive steam engine, (to and behind which a certain carriage called a tender was then and there attached, and which said locomotive steam engine and tender were then and there being forced and propelled by the power of steam on and along a certain way, to wit, a railway; and which said locomotive steam engine and tender he the said S. H. was then and there managing, controlling, conducting, and driving, in and along the said railway, and in the managing, controlling, conducting, and driving whereof, he the said W. W. was then and there him the said S. H. aiding and assisting), did then and there wilfully and feloniously, by the wanton and felonious negligence of them and each of them respectively, and by the wilful and felonious disregard of the duties incumbent upon them, and each of them respectively, in that behalf, cause, occasion, permit, and suffer to strike and run into, upon, and against, and to be with great force and violence forced, driven, and dashed into, upon, and against a certain other locomotive steam engine, to which said last-mentioned locomotive steam engine a certain other tender and divers, to wit, twenty carriages, were then and there attached, and which said last-mentioned locomotive steam engine and tender and carriages were then and there lawfully travelling and being propelled on and along the said railway, and that the said S. H., and the said W. W., did thereby, and by means of the said several premises, and by reason of the shock and concussion thereby caused and communicated to the said first-mentioned locomotive steam engine and tender, then and there wilfully and feloniously, and with great force and violence, push, force, dash, drive, and jam, and cause to be pushed, forced, dashed, driven and jammed in, upon, over, and between a certain part of the said first-mentioned locomotive steam engine, to wit, the hinder part thereof, the said R. P., who was then and there standing and being in and upon the said first-mentioned locomotive steam engine, and did then and there, and by means of the said pushing, forcing, dashing, driving and jamming, wilfully and feloniously inflict, and cause to be inflicted, in and upon the head, to wit, in and upon the right side of the head of him the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs and feet of him the said R. P., divers mortal wounds, contusions, bruises, burns and scalds, of which said several wounds, fractures, contusions, bruises, burns and scalds he the said R. P., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died; and so the jurors aforesaid, &c.

Sixth count.

Sixth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said S. H. and the said W. W., on the day and year aforesaid, with force and arms, at the parish of Richmond aforesaid,

in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said R. P., in the peace of God and of our lady the Queen then and there being, feloniously and wilfully did make an assault, and that they the said S. H. and the said W. W., a certain locomotive steam engine, to and behind which a certain carriage called a tender was then and there attached, and which said locomotive steam engine and tender were then and there being forced and propelled by the power of steam on and along a certain way, to wit, a railway, and which said locomotive steam engine and tender he the said S. H. was then and there managing, controlling, conducting and driving in and along the said railway, and in the managing, controlling, conducting and driving whereof he the said W. W. was then and there him the said S. H. aiding and assisting, did then and there wilfully and feloniously, and by the wanton and felonious negligence of them and each of them respectively, and by the wilful and felonious disregard of the duties incumbent upon them and each of them respectively in that behalf, and with great force and violence, conduct, drive and propel, and cause and permit to be conducted, driven and propelled to, upon, along and across a certain other part of the railway aforesaid, and thereby and by reason of the said several premises and of the said wilful and felonious negligence of the said S. H., and of the said W. W., a certain train, to wit, a train consisting of a certain other locomotive steam engine with a certain other tender, and divers, to wit, twenty carriages attached thereto and drawn thereby, and which said train was then and there lawfully travelling and being propelled on and along the said last-mentioned part of the said line of railway, did then and there unavoidably and with great force and violence strike, drive, dash and impinge upon and against the said first-mentioned locomotive steam engine; and by means of the said several premises and of the shock and concussion thereby given and communicated to the said first-mentioned locomotive steam engine, the said R. P., who then and there was standing and being in and upon the said first-mentioned locomotive steam engine, was then and there with great force and violence pushed, forced, dashed, driven and jammed in, upon, over, and between a certain part of the said first-mentioned locomotive steam engine, to wit, the hinder part thereof, and by means of the said pushing, forcing, dashing, driving and jamming then and there were inflicted in and upon the head, to wit, in and upon the right side of the head of him the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs and feet of him the said R. P., divers mortal wounds, bruises, contusions, burns and scalds, of which said mortal wounds, fractures, bruises, contusions, burns and scalds he the said R. P., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died; and so the jurors, &c.

Precedents.

No. VI.
Indictment for
manslaughter
against the
driver and
stoker of a
railway engine,
&c., &c.

Seventh Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said S. H. and the said W. W., on the day and year aforesaid, with force and arms at the parish of Richmond aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said R. P., in the peace of God and of our said lady the Queen then and there being, feloniously and wilfully did make an assault, and that the said S. H. and W. W., a certain locomotive steam engine, to and behind which a certain carriage called a tender was then and there attached, and which said locomotive steam engine and tender were then and there the property of a certain corporate body,

Seventh count.

Precedents.

No. VI.
Indictment for
manslaughter
against the
driver and
stoker of a
railway engine,
&c., &c.

to wit, the London and South Western Railway Company, and were then and there lawfully standing and being in and upon a certain railway, to wit, at and near a certain station belonging to the said railway, did then and there wilfully and feloniously and without any lawful authority in that behalf, and with great force and violence, conduct, drive and propel, and cause, permit and suffer to be conducted, driven and propelled away from the said station along, to, upon and across a certain other part of the railway aforesaid, and thereby and by reason of the said several premises a certain train, to wit, a train consisting of a certain other locomotive steam engine, with a certain other tender, and divers, to wit, twenty carriages attached thereto and drawn thereby, and which said train was then and there lawfully travelling and being propelled on and along the line of the said railway, did then and there unavoidably and with great force and violence strike, dash, drive and impinge upon and against the said first-mentioned locomotive steam engine, and by means of the said several premises and of the shock and concussion thereby given and communicated to the said first-mentioned locomotive steam engine, the said R. P., who then and there was standing and being in and upon the said first-mentioned locomotive steam engine, was then and there with great force and violence pushed, forced, dashed, driven and jammed in, upon, over and between a certain part of the said first-mentioned locomotive steam engine, to wit, the hinder part thereof, and by means of the said pushing, forcing, dashing, driving and jamming then and there were made and inflicted in and upon the head, to wit, in and upon the right side of the head of him the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs and feet of him the said R. P., divers mortal wounds, bruises, contusions, burns and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns and scalds he the said R. P., on the day and year aforesaid at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died ; and so the jurors, &c.

STATUTES AND PARTS OF STATUTES
RELATING TO THE CRIMINAL LAW.

THE PROTECTION OF WOMEN.

12 & 13 VICT. CAP. 76.

An Act to protect Women from fraudulent Practices for procuring their Defilement.—[28th July, 1848.]

Sect. I. **F**OR the better preventing the heinous offence of procuring the defiling of women, which certain infamous persons do most wickedly practise, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that if any person shall, by false pretences, false representations, or other fraudulent means, procure any woman or child under the age of twenty-one years to have illicit carnal connexion with any man, such person shall be guilty of a misdemeanor, and shall, being duly convicted thereof, suffer imprisonment for a term not exceeding two years, with hard labour.

II. And be it enacted, that where any prosecutor or other person shall appear before any court on recognizance to prosecute or give evidence against any person charged with any offence against this act, every such court is hereby authorized and empowered, whether any bill of indictment for such charge shall or shall not be actually preferred, to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, in the same manner as courts are now by law authorized and empowered to order the same in cases of prosecution for felony.

III. And be it enacted, that every order for the payment of any money by virtue of this act shall be made out and delivered by the proper officer of the court unto such prosecutor or other person upon the same terms and in the same manner in all respects as orders for the payment of costs are now made in cases of felony, and the treasurer or other person when any such order shall be made shall be and he is hereby required, upon sight of such order, forthwith to pay to the person therein named, or to any one duly authorized in that behalf, the money in such order mentioned, and such treasurer or other person shall be allowed the same in passing his accounts.

THE CRUELTY TO ANIMALS PREVENTION ACT.

12 & 13 VICT. CAP. 92.

An Act for the more effectual Prevention of Cruelty to Animals.—
[1st August, 1849.]

Sect. I. **W**HEREAS an act was passed in the session of Parliament holden in the fifth and sixth years of the reign of His late Majesty King William the Fourth, intituled *An Act to consolidate and amend the several Laws relating to the cruel and improper Treatment of Animals, and the Mischiefs arising from the driving of Cattle, and to make other Provisions in regard thereto*: and whereas another act was passed in the first year of the reign of our Sovereign Lady Queen Victoria, intituled *An Act to extend to Ireland the Act of the Fifth and Sixth Years of His late Majesty's Reign, consolidating and amending the Laws relating to the cruel and improper Treatment of Animals*: and whereas it is expedient to repeal the provisions of the said recited acts, and to make other and more effectual provisions for promoting the objects and purposes of the said acts: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act the said recited acts (excepting so far as they, or either of them, repeal any other act or part of any other act) be and the same are hereby repealed, save as to any offences committed against the provisions of the said recited acts, or either of them, before the passing of this act, which offences shall and may be dealt with, and the offenders proceeded against and punished, as if this act had not passed.

Recited acts
repealed, save
as to offences
committed
before passing
of this act.

Penalty for
cruelty to
animals.

As to places
kept for bull-
baiting, dog-
fighting, &c.

As to damage
done by persons
guilty of cruelty
to animals.

II. And be it enacted, that if any person shall from and after the passing of this act cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding five pounds.

III. And be it enacted, that every person who shall keep or use or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding five pounds for every day he shall so keep or use or act in the management of any such place, or permit or suffer any place to be used as aforesaid; provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid shall be deemed to be the keeper thereof; and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid shall forfeit and pay a penalty not exceeding five pounds for every such offence.

IV. And be it enacted, that if any person shall, by cruelly beating, ill-treating, over-driving, abusing, or torturing any animal, do any damage or injury to such animal, or shall thereby cause any damage or injury to

be done to any person or to any property, every such offender shall on conviction of such offence pay to the owner of such animal (if the offender shall not be the owner thereof), or to the person who shall sustain damage or injury as aforesaid, such sum of money by way of compensation, not exceeding the sum of ten pounds, as shall be ascertained and determined by the justice of the peace by whom such person shall have been convicted: provided always, that the payment of such compensation, or any imprisonment for the nonpayment thereof, shall not prevent or in any manner affect the punishment to which such person or the owner of such animal may be liable for or in respect of the beating, ill-treating; or abusing of the said animal: provided also, that nothing herein contained shall prevent any proceeding by action against such offender, or the employer of such offender, where the amount of damage or injury is not sought to be recovered under this act.

12 & 13 Vict.
c. 92.

*The Cruelty to
Animals
Prevention
Act.*

V. And be it enacted, that every person who shall impound or confine, or cause to be impounded or confined, in any pound or receptacle of the like nature, any animal, shall provide and supply during such confinement a sufficient quantity of fit and wholesome food and water to such animal; and every such person who shall refuse or neglect to provide and supply such animal with such food and water as aforesaid shall for every such offence forfeit and pay a penalty of twenty shillings.

Persons
impounding
animals to
provide food
and water.

VI. And be it enacted, that in case any animal shall at any time be impounded or confined as aforesaid, and shall continue confined without fit and sufficient food and water for more than twelve successive hours, it shall and may be lawful to and for any person whomsoever, from time to time, and as often as shall be necessary, to enter into and upon any pound or other receptacle of the like nature in which any such animal shall be so confined, and to supply such animal with fit and sufficient food and water during so long a time as such animal shall remain and continue confined as aforesaid, without being liable to any action of trespass or other proceeding by any person whomsoever for or by reason of such entry for the purposes aforesaid; and the reasonable cost of such food and water shall be paid by the owner of such animal, before such animal is removed, to the person who shall supply the same, and the said cost may be recovered in like manner as herein provided for the recovery of penalties under this act.

Power to supply
food and water
to animals
impounded.

VII. And whereas by an act of Parliament passed in the twenty-sixth year of the reign of His late Majesty King George the Third, intituled *An Act for regulating Houses and other Places kept for the Purpose of slaughtering Horses*, it is enacted, that every person and persons licensed according to the provisions of that act shall cause to be painted or affixed over the door or gate of the house or place where he, she, or they shall carry on the business of slaughtering horses or other cattle, in large legible characters, his, her, and their name and names, together with the words "licensed for slaughtering horses, pursuant to an act passed in the twenty-sixth year of His Majesty King George the Third:" and whereas no penalty is provided by the said recited act for the refusal or neglect to comply with the said provision: for remedy whereof be it enacted, that any person licensed as aforesaid who shall refuse or neglect to comply with the said recited provision of the said recited act shall forfeit and pay for such offence a penalty not exceeding five pounds, and shall forfeit and pay a like penalty for every day during which such refusal or neglect shall continue, such penalties to be recovered as penalties under this act are directed to be recovered.

26 Geo. 3, c. 71.

Persons keeping
places for
slaughtering
cattle, &c. to
affix names, &c.

12 & 13 Vict.
c. 92.

*The Cruelty to
Animals
Prevention
Act.*

Regulations as
to cattle sent to
be slaughtered.

VIII. And be it enacted, that every person keeping or using or acting in the management of any place for the purpose of slaughtering horses or other cattle (not intended for butchers' meat) shall, immediately upon any horse or other cattle being brought to or delivered at such place for the purpose of being slaughtered, cut off or cause to be cut off the hair from the neck of such horse or other cattle, and within three days from the time of such horse or other cattle being brought or delivered as aforesaid shall kill or cause to be killed the said horse or other cattle, and, until such horse or other cattle shall be killed, shall supply such horse or other cattle with a sufficient quantity of fit and wholesome food and water; and if any person keeping or using or acting in the management of any such place shall neglect or omit to cut or cause to be cut off the hair of the neck of such horse or other cattle, within the time above limited, or shall neglect or omit to supply a sufficient quantity of fit and wholesome food and water to such horse or other cattle as aforesaid, every such person shall on conviction of any or either of the said offences be liable to a penalty not exceeding five pounds.

Cattle intended
for slaughter not
to be employed.

IX. And be it enacted, that if any person keeping or using or having the management of any place for the purpose of slaughtering horses or other cattle (not intended for butchers' meat) shall use or employ or cause or permit to be used or employed any horse or other cattle brought to or delivered at, or which shall be in or upon such place for the purpose of being slaughtered, or shall permit or suffer any such horse or other cattle to leave the said place, to be employed in any manner of work, every such person shall be liable to forfeit and pay a penalty not exceeding forty shillings for every day on which such horse or other cattle shall be so used or employed, or shall be absent from such place; and every person who shall be found using or employing any such horse or other cattle, or in the possession of any such horse or other cattle whilst so used or employed, shall be liable to forfeit and pay a penalty not exceeding forty shillings for every day he shall use or employ or be so possessed of any such horse or other cattle as aforesaid.

Penalty.

Description of
cattle to be
entered in a
book.

X. And be it enacted, that every person keeping or using or having the management of any place for slaughtering horses or other cattle (not intended for butchers' meat) shall, at the time of receiving any horse or other cattle in such place, enter in a book such a full and correct description of the colour, marks, and gender of such horse or other cattle as may clearly distinguish and identify the same; and if any such person shall refuse or neglect to make or cause to be made such entry in a clear and distinct manner, or shall refuse or neglect to produce such book before any justice of the peace whenever required by such justice so to do, or shall refuse to allow such book to be inspected, and extracts to be made therefrom, at all reasonable times, by any constable, or other person duly authorized by such justice, every such person shall be liable to forfeit and pay a penalty for every such offence not exceeding forty shillings.

Penalty for
neglect.

Persons
licensed to
slaughter horses
not to be
licensed as
horse dealers at
the same time.

XI. And be it enacted, that it shall not be lawful for any person who shall be licensed to slaughter horses, during the time while such licence shall be in force, to be licensed as a horse dealer, or exercise or use the trade or business of a dealer in horses, and if any person licensed to slaughter horses shall, while such licence shall be in force, obtain a licence as a horse dealer, every such last-mentioned licence shall be void.

Penalty for
improperly
conveying
animals.

XII. And be it enacted, that if any person shall convey or carry or cause to be conveyed or carried in or upon any vehicle any animal in such a manner or position as to subject such animal to unnecessary pain

or suffering, every such person shall forfeit and pay a penalty not exceeding three pounds for the first offence, and a penalty of five pounds for the second and every subsequent offence.

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c. 92.

*The Cruelty to
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Apprehension
of offenders.

XIII. And be it enacted, that when and so often as any of the offences against the provisions of this act shall happen, it shall and may be lawful for any constable, upon his own view thereof, or upon the complaint and information of any other person who shall declare his or her name and place of abode to the said constable, to seize and secure by the authority of this act any such offender, and forthwith without any other authority or warrant to convey such offender before a justice of the peace, to be dealt with by such justice for such offence according to law.

XIV. And be it enacted, that every complaint under the provisions of this act shall be made within one calendar month after the cause of such complaint shall arise, and every offence committed against this act may be heard and determined by any justice of the peace within whose jurisdiction such offence shall be committed in a summary way upon the complaint of any person and without any information in writing; and it shall be lawful for any such justice in all cases, where any person complained of shall not be in custody, to summon such person to appear before such justice, or before any other justice of the peace at a time and place to be named in such summons; and on the appearance of the party accused, or in default of such appearance upon proof of the service of such summons, the said justice or any other justice who shall be present at the time and place appointed for such appearance shall proceed to examine into the matter; and if upon the confession of the party accused, or on the oath of one or more credible witness or witnesses, the party accused shall be convicted of having committed the offence charged or complained of, the party so convicted shall pay such penalty, damage, or compensation as the said justice shall according to the provisions of this act adjudge, order, or award, together with the costs of conviction, to be settled by such justice, or be otherwise dealt with according to the provisions of this act.

Justice may
hear complaints
made under this
act within one
month after
offence
committed.

XV. And be it enacted, that any summons issued by any such justice, requiring the appearance of any party charged as an offender against any of the provisions of this act, shall be deemed and taken to be well and sufficiently served in case either the summons or a copy thereof shall be served personally on such person as aforesaid, or shall be left at his usual or last known place of abode, in whatever county or place such summons may be served or left.

As to service of
summons.

XVI. And be it enacted, that any justice of the peace may, without issuing any such summons as aforesaid, forthwith issue his warrant for the apprehension of any person charged with any offence against the provisions of this act, whenever good grounds for so doing shall be stated on oath before such justice.

Warrant may be
issued by justice
without
summons.

XVII. And be it enacted, that any justice of the peace may summon any witness to appear and give evidence before him upon the matter of any offence against the provisions of this act; and if any such witness shall, after tender of his reasonable expenses in that behalf, neglect or refuse to attend at the time and place stated in such summons, then, proof on oath being first given of the personal service of the summons upon such witness, such justice may issue his warrant for the apprehension of such witness, and such justice may commit any witness appearing or being brought before him who shall refuse to give evidence to the house of correction or common gaol within the jurisdiction of such justice, there

Justices may
summon
witnesses to
appear.

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c. 92.

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Animals
Prevention
Act.*

Offenders not
paying penalty
may be
committed.

to remain without bail or mainprize for any time not exceeding twenty-one days, or until such witness shall sooner submit himself to be examined and to give evidence; and in case of such submission the order of such justice shall be a sufficient warrant for the immediate discharge of such witness from custody.

XVIII. And be it enacted, that in every case of a conviction under this act, where the sum imposed as a penalty, or the amount awarded for compensation or damage, together with costs (if any), by any justice of the peace, for or in respect of any offence against the provisions of this act, shall not be paid immediately upon the conviction, or within such time as the convicting justice shall, in the exercise of his discretion, appoint and limit in that behalf, it shall be lawful for such justice and he is hereby required to commit the offender to the house of correction, there to be imprisoned, with or without hard labour, for any time not exceeding two calendar months, unless payment be sooner made: provided always, that if such conviction shall take place before two justices or before one of the police magistrates sitting at any police court within the metropolitan police district it shall be lawful for such justices, or such police magistrate, if they or he shall think fit, instead of imposing a pecuniary penalty, forthwith to commit any such offender to the house of correction, there to be imprisoned, with or without hard labour, for any time not exceeding three calendar months.

Vehicles, &c.,
may be
detained.

XIX. And be it enacted, that whenever any person having charge of any vehicle or any animal shall be taken into custody by any constable for any offence against the provisions of this act, it shall be lawful for such constable to take charge of such vehicle or animal, and deposit the same in some place of safe custody as a security for payment of any penalty to which the person having had charge thereof, or the owner thereof, may become liable, and for payment of any expenses which may have been or may be necessarily incurred for taking charge of and keeping the same; and it shall be lawful for any justice of the peace before whom the case shall have been heard to order such vehicle or such animal to be sold for the purpose of satisfying such penalty and reasonable expenses, in default of payment thereof, in like manner as if the same had been subject to be distrained and had been distrained for the payment of such penalty and expenses.

Penalty for
obstructing
constables.

XX. And be it enacted, that in case any person shall at any time or in any manner unlawfully obstruct, hinder, molest, or assault any constable or keeper of a pound while in the exercise of any power or authority under or by virtue of this act, every such person shall forfeit and pay a penalty not exceeding five pounds for every such offence.

Distribution of
penalties.

XXI. And be it enacted, that all pecuniary penalties which shall be recovered before any justice of the peace under the provisions of this act shall be respectively divided, paid, and distributed in the following manner; (that is to say,) one moiety thereof to the overseers of the poor of the parish in which the offence shall have been committed, to be by such overseers applied in aid of the rates of their respective parishes, and the other moiety thereof to the person who shall complain and prosecute for the same, or to such other person as to such justice shall seem fit and proper; and that every sum of money which shall or may be ascertained, determined, adjudged, and ordered by any justice of the peace under the authority of this act to be paid as the amount of any damage or injury occasioned by the commission of any of the offences hereinbefore mentioned shall be paid to the person who shall or may have sustained such

damage or injury, according to the order or determination and discretion of such justice: provided always, that the moiety of penalties hereby directed to be paid to the overseers of the poor shall, if recovered before any justice of the peace under the provisions of this act upon convictions of offences committed in Ireland, be paid to such hospital, dispensary, or infirmary as the justice before whom the conviction shall have taken place may direct, to be by the treasurer thereof applied in aid of the funds maintaining such institution.

XXII. And be it enacted, that when any complaint shall be made before any justice of the peace against the driver or conductor of any hackney carriage, or the driver or conductor of any stage carriage, or the driver of any cart, waggon, van, or other vehicle, for any offence committed by him against the provisions of this act, it shall be lawful for such justice, if he shall think proper, forthwith to summon the proprietor of such hackney or stage carriage, or the owner of such cart, waggon, van, or other vehicle, to produce before him the driver, conductor, or other servant by whom such offence was committed, to answer such complaint; and in case such proprietor or owner, after being duly summoned, shall fail to produce the driver, conductor, or servant, it shall be lawful for the justice of the peace before whom such driver, conductor, or servant shall be required to be produced, if he shall think fit, to proceed, in the absence of such driver, conductor, or servant, to hear and determine the case, in the same manner as if he had been produced, and to adjudge payment, by the proprietor or owner, of any penalty or sum of money and costs in which the driver, conductor, or servant shall be convicted; and any sum of money which shall be so paid by the proprietor or owner shall and may be recovered in a summary way from the driver, conductor, or servant through whose default such sum shall have been paid, upon proof of payment thereof, and of such servant's refusing or neglecting to be produced pursuant to the order of the justice, in the same manner as penalties are to be recovered under the provisions of this act: provided always, that if the said justice of the peace shall deem it proper, it shall be lawful for him, when such proprietor or owner shall fail to produce his driver, conductor, or servant, without any satisfactory excuse, to be allowed by such justice, to impose a fine of forty shillings upon such proprietor or owner, and so from time to time as often as he shall be summoned in respect of such complaint, until he shall produce the said driver, conductor, or servant.

XXIII. And be it enacted, that every conviction for any offence against this act may be drawn and made according to the following form or to the effect thereof, or as near thereto as the case shall permit:

“ to wit. } BE it remembered, that on the day of in the
C. D. &c., a justice [or justices] of the peace for the [here insert the
county, borough, or other jurisdiction of the justice or justices], and is
charged before me [or us] with having [here describe the offence], con-
trary to the provisions of a certain act [here insert the title of this act],
and it appearing unto me [or us] upon the confession of the said A. B.
[or upon the oath of a credible witness or witnesses, as the case may be,]
that the said A. B. is guilty of the said offence, I do therefore adjudge
the said A. B. [here insert the adjudication, and, in the case of a second
or subsequent offence, add these words, the same being the second [or
any subsequent] offence against the provisions of the said act]. Given

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c. 92.

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Proprietors of
public vehicles
may be
summoned to
produce their
servants.

Form of
conviction.

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c. 92.

*The Cruelty to
Animals
Prevention
Act.*

Convictions to
be transmitted
to general or
quarter
sessions.

under my [*or our*] hand [*or hands*] at [here insert the place where the justice or justices may be], the day and year first above written."

XXIV. And be it enacted, that every justice of the peace before whom any person shall be convicted of any offence against this act shall transmit the conviction to the next general or quarter sessions which shall be holden for the county, borough, or other jurisdiction wherein the offence shall have been committed, there to be kept by the proper officer among the records of the said court; and upon any complaint or proceeding against any person for a subsequent offence a copy of such conviction certified by the proper officer of the said court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shown.

Appeal.

XXV. And be it enacted, that in all cases where the sum adjudged to be paid on any conviction shall exceed two pounds, and in all cases where imprisonment shall be adjudged, any person who shall think himself aggrieved by any such conviction may appeal to the next court of general or quarter sessions which shall be holden not less than fourteen days after the day of such conviction for the county, borough, or other jurisdiction wherein the cause of appeal shall have arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or enter into a recognizance, with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into shall liberate such person, if in custody, and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein as to the court shall seem meet, and in case of the dismissal or nonprosecution of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be thereby awarded, and also the costs of such appeal, or incident thereto or occasioned thereby, and shall, if necessary, issue process for enforcing such judgment: provided always, that it shall be lawful for the said court to adjourn the hearing of any such appeal to any succeeding sessions, if such court shall think fit; and such court, in the event of such postponement, may make any order for the payment of costs by either party to the other as to such court shall seem reasonable.

Convictions not
to be removed.

XXVI. And be it enacted, that no conviction made under the authority of this act, nor any order, judgment, or proceeding relative thereto, shall be quashed for want of form, or be removed by *certiorari*, or otherwise into any of Her Majesty's superior courts of record; and no warrant of commitment under the provisions of this act shall be held void by reason of any defect therein, provided it be therein alleged that the party committed has been convicted, and there be a good and valid conviction to sustain the same.

As to actions.

XXVII. And be it enacted; that no action shall be brought against any justice of the peace or other person for anything done in pursuance or under the authority of this act, unless such action shall be commenced within two calendar months next after the fact committed, and no such

action shall be commenced until one calendar month at least after a notice in writing of such intended action shall have been delivered to the defendant, or left for him at his usual place of abode, by the party intending to commence such action, or by his attorney or agent, in which said notice the cause of action shall be clearly and explicitly stated, and upon the back thereof shall be endorsed the name and place of abode of the party so intending to sue, and also the name and place of abode or of business of the said attorney or agent, if such notice have been served by such attorney or agent; and in every such action the venue shall be laid in the county where the act complained of was committed, or, in actions in the county court, the action shall be brought in the court within the jurisdiction of which the act complained of was committed; and the defendant in any such action shall be allowed to plead the general issue therein, and to give any special matter of defence, excuse, or justification in evidence under such plea, at the trial of such action; and in every such case, after notice of action shall be given as aforesaid, and before such action shall be commenced, the defendant to whom such notice shall be given may tender to the party complaining, or to his attorney or agent, such sum of money as he may think fit, as amends for the injury complained of in such notice; and after such action shall have been commenced, and at any time before issue joined therein, such defendant, if he have not made such tender, shall be at liberty to pay into court such sum of money as he may think fit; and which said tender and payment of money into court, or either of them, may afterwards be given in evidence by the defendant at the trial under the general issue aforesaid; and if it shall be found at the trial that the plaintiff is not entitled to damages beyond the sum tendered or paid into court, or beyond the sums so tendered and paid into court, the defendant shall be entitled to a verdict, and the plaintiff shall not be at liberty to elect to be nonsuit; and the sum of money, if any, so paid into court, or so much thereof as shall be sufficient to pay or satisfy the defendant's costs in that behalf, shall thereupon be paid out of court to him, and the residue, if any, shall be paid to the plaintiff; or, if, where money is so paid into court in any such action, the plaintiff shall elect to accept the same in satisfaction of his damages in the said action, he may obtain from any judge of the court in which such action shall be brought an order that such money shall be paid out of court to him, and that the defendant shall pay him his costs, to be taxed; and thereupon the said action shall be determined, and such order shall be a bar to any other action for the same cause.

XXVIII. And be it enacted, that if at the trial of any such action the plaintiff shall not prove that such action was brought within the time hereinbefore limited in that behalf, or that such notice as aforesaid was given one calendar month before such action was commenced, or if he shall not prove the cause of action stated in such notice, or if he shall not prove that such cause of action arose in the county or place laid as venue in the margin or declaration, or when such plaintiff shall sue in the County Court within the district for which such court is holden, then and in every such case such plaintiff shall be nonsuit, or the defendant shall be entitled to a verdict; and the defendant shall in all cases where he shall obtain judgment, upon verdict or otherwise, be entitled to his full costs in that behalf, to be taxed as between attorney and client.

XXIX. And be it enacted, that for the purposes of this act the following words and expressions are intended to have the meanings hereby

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c. 92.

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Venue in
actions.

Costs.

Meaning of
certain words.

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assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter; (that is to say),

The word "justice" shall be taken to mean a justice of the peace or magistrate for the county, city, borough, liberty, cinque port, riding, or other jurisdiction in which any offence against this act shall be committed, or in which the matter requiring the cognizance of any justice of the peace or magistrate shall arise:

The word "animal" shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal:

The word "constable" shall be taken to mean any headborough, parish beadle, peace officer, special constable, or any person belonging to the metropolitan or city of London police forces, or any constabulary force in any part of the United Kingdom:

The expression "house of correction" shall be taken to mean the house of correction or common gaol for the county, city, borough, liberty, cinque port, riding, or other jurisdiction for which the justice of the peace by whom any person shall be committed under the provisions of this act shall act:

And, subject to the context and to the nature of the subject-matter, words denoting the singular number are to be understood to apply also to a plurality of persons, animals, or things; and words denoting the masculine gender are to be understood to apply also to persons and animals of the feminine gender; and the word "over-drive" shall also signify over-ride.

Act not to
extend to
Scotland.

XXX. And be it enacted, that this act shall not extend or apply to Scotland.

Act may be
amended, &c.

XXXI. And be it enacted, that this act may be amended or repealed by any act to be passed in the present session of Parliament.

APPENDIX OF PRECEDENTS.

No. VII.

Indictment for Manslaughter against the Keeper of an Asylum for Pauper Children, for not supplying one of them with proper Food and Lodging, whereby the Child died.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present, that heretofore, and during all the days and times hereinafter in this count mentioned, James Andrews was a poor, indigent and destitute infant child of very tender age, to wit, of the age of six years, and unable to provide himself with necessary food, shelter or clothing, or any of the necessaries of life; and that heretofore, to wit, on the 28th day of October, in the year of our Lord, 1848, Peter Bartholomew Drouet, late of the parish of Tooting, in the county of Surrey, and within the jurisdiction of the said Central Criminal Court, gentleman, being the keeper of a certain asylum for the reception of poor, destitute and indigent children, at the parish aforesaid, and within the jurisdiction of the said court, to wit, called and known by the name of Surrey Hall, at the request and with the approbation of the guardians of the poor of the Holborn Union, in the county of Middlesex (who then had the charge and custody of the said J. A., and then under the laws of this realm relating to the relief of the poor, were charged with the relief and support of the said J. A., within their said union), at his request received and had the said J. A. in the charge and custody of him the said P. B. D., by him to be provided with good and proper abode, shelter and lodging, and all necessary sleeping accommodation, meat, drink, food and clothing, for and on behalf of the said guardians, for reward to the said P. B. D. in that behalf. And the jurors further present, that thenceforth, and on and from the said 28th of October, 1848, and upon and during all the days and times between that day and the 5th day of January, A.D. 1849, the said P. B. D. kept and detained the said J. A., and the said J. A. continued and remained, and was under the charge, care, dominion, government, custody and control of the said P. B. D., in the said asylum, to wit, at the parish aforesaid, and within the jurisdiction of the said Central Criminal Court, and the said J. A. was, during all the several days and times aforesaid, wholly subject to and dependent upon the said P. B. D., for such abode, shelter, lodging, sleeping accommodation, meat, drink, food and clothing as aforesaid, and was unable to obtain the same, or any of them, from any other source, or from any other person or persons whomsoever. And the jurors aforesaid, upon their oath aforesaid, do further present, that thereupon, to wit, upon the said 28th day of October, in the year of our Lord, 1848, and thenceforth during all the days and times in this count aforesaid, it became and was the duty of the said P. B. D. to furnish, provide and supply the said J. A. with good and wholesome food, meat

Precedents.

No. VII.
Indictment for
manslaughter
against keeper
of an asylum
for pauper
children, &c.

and drink in such sufficient quantities as should be necessary for the healthy support, nourishment and sustenance of the body of the said J. A.; and also to furnish, provide and supply the said J. A. with such proper, suitable and wholesome lodging, shelter and abode as should, upon and during all the several days and times aforesaid, be needful for the said J. A. and be necessary to preserve him in a good and sound state of bodily health, and free from sickness, weakness and disorder; and also during all the days and times aforesaid to furnish, provide and supply the said J. A. with such healthy, wholesome and proper bedding and sleeping accommodation as should be necessary to enable the said J. A. to enjoy a due and proper quantity of wholesome, healthy and refreshing rest and sleep; and also to furnish, provide and supply the said J. A. with a sufficient quantity of warm and wholesome clothing for the protection of the body of the said J. A. from the cold, damp and inclemency of the weather; all of which said several premises the said P. B. D., upon and during all the several days and times in this count mentioned, well knew; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said P. B. D., on the several days aforesaid, with force and arms, at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, in and upon the said J. A., in the peace of God and of our said Lady the Queen then and there being, feloniously did make divers assaults; and that the said P. B. D., not regarding his duty as aforesaid, upon all and every the days aforesaid, and during all the said times, whilst the said J. A. remained and continued under the care, charge, dominion, government, custody and control of the said P. B. D. in the said asylum, at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, feloniously did omit, neglect and refuse to furnish, provide or supply the said J. A. with good and wholesome food, meat and drink, in such sufficient quantities as were upon and during all and every of those days respectively, and during all the time aforesaid, necessary for the healthy support, nourishment and sustenance of the body of the said J. A., according to the duty of the said P. B. D. in that behalf, and on the contrary thereof, upon and during all and every the days aforesaid, and during all the time aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, feloniously, and without any lawful excuse whatsoever, did furnish, provide and supply the said J. A. with food, meat and drink, in very insufficient and inadequate quantities, and in no sufficient and adequate quantity or quantities whatsoever, for such support, nourishment and sustenance of the body of the said J. A. as aforesaid; and that the said P. B. D., not regarding his duty as aforesaid, upon and during all and every the days aforesaid, and during all the said time whilst the said J. A. remained and continued under such charge, care, dominion, government, custody and control as aforesaid, in the said asylum, at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, feloniously did omit, neglect and refuse to furnish, provide or supply the said J. A. with such proper, suitable and wholesome lodging, shelter and abode as was, upon and during all the several days aforesaid, and during all the time aforesaid, needful for the said J. A., and necessary to preserve him in a good and sound state of bodily health, and free from sickness, weakness and disorder, and as, according to the said duty of the said P. B. D., he ought to have done, and on the contrary thereof, the said P. B. D., at the parish of Tooting aforesaid, and within the jurisdiction

of the said Central Criminal Court, upon and during all the several days aforesaid, and during all the time aforesaid, knowingly, feloniously and contrary to his duty in that behalf, did keep the said J. A., and force, compel and oblige the said J. A. to be and remain in divers ill-ventilated and unwholesome rooms, inhabited by and overcrowded with an excessive and injurious number of other persons in the said asylum, and feloniously did expose the said J. A., and force and compel the said J. A. to be and remain exposed for divers long spaces of time, on each of the days aforesaid, to divers fetid, injurious, noxious, unwholesome and pestilential exhalations and vapours in, near to, around and about the said asylum then arising and existing; and that the said P. B. D., not regarding his duty as aforesaid, upon and during all and every the days aforesaid, and during all the said time whilst the said J. A. remained and continued under such charge, care, dominion, government, custody and control as aforesaid, in the said asylum, at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, feloniously did omit, neglect and refuse to furnish, provide or supply the said J. A. with such healthy, wholesome and proper bedding and sleeping accommodation as was necessary to enable the said J. A., on all and every the said several days aforesaid, to enjoy a due quantity of wholesome, healthy and refreshing rest and sleep, and as, according to the duty of the said P. B. D., he ought to have done, and on the contrary thereof, upon divers nights during all the time aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, feloniously and knowingly did force, oblige and compel the said J. A. to lie and be in a certain ill-ventilated and unwholesome room, then overcrowded with an excessive and injurious number of other persons in the said asylum, and to be and remain, for divers long spaces of time on each of the nights aforesaid, in divers fetid, injurious, noxious, unwholesome and pestilential vapours and exhalations in the said room arising and existing, and also to lie and be in a certain small bed in the said room, together with two other persons, to wit, Joseph Andrews and William Derbyshire, whereby the said bed became and was, on all and every of the said nights, rendered unwholesome and injurious to the said J. A., and totally unfit for and incapable of affording to the said J. A. such wholesome, healthy and refreshing sleep as aforesaid; and that the said P. B. D., not regarding his duty as aforesaid, upon and during all and every the days aforesaid, and during all the said time whilst the said J. A. remained and continued under such charge, care, dominion, government, custody and control as aforesaid, in the said asylum, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, feloniously did omit, neglect and refuse to furnish, provide or supply the said J. A. with any sufficient quantity of warm and wholesome clothing, or with a sufficient quantity of any clothing whatever for the protection of the body of the said J. A. from the cold, damp, and inclemency of the weather, and as, according to the duty of the said P. B. D., he ought to have done, and on the contrary thereof, during divers cold, wet and inclement days during the time aforesaid, at the parish aforesaid, and within the jurisdiction of the said Central Criminal Court, feloniously, and contrary to his duty in that behalf, left the said J. A. exposed, and then and there suffered and permitted the said J. A. to remain exposed, for divers long spaces of time, to the cold, damp and inclemency of the weather, &c., without any sufficient or adequate quantity of clothing or covering for his body, and with a totally inadequate and insufficient

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against keeper
of an asylum
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children, &c.

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quantity of clothing and covering for the body of the said J. A., to protect him from the severity and inclemency of the weather. By reason and means of which said several felonious acts, defaults, and omissions of the said P. B. D. hereinbefore alleged, the said J. A. afterwards, on the said 5th day of January, in the year of our Lord, 1849, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, became and was, and the said P. B. D. did thereby then and there feloniously cause and occasion the said J. A. to become and be mortally sick, weak, diseased, disordered, and distempered in his body. Of which said mortal sickness, weakness, disease, disorder, and distemper the said J. A., on and from the said last mentioned day, and in the year of our Lord, 1849, until the 6th day of January in the same year, as well at the parish aforesaid and within the jurisdiction of the said court, as at the parish of Saint Pancras in the county of Middlesex, and within the jurisdiction of the said court, did languish, and languishing did live, and then on the said last-mentioned day, at the parish last aforesaid, in the county last aforesaid, and within the jurisdiction of the said court, of the mortal sickness, weakness, disease, disorder, and distemper aforesaid, did die. And so the jurors aforesaid, upon their oath aforesaid, do say, that he the said P. B. D., him the said J. A., in manner and form aforesaid, feloniously did kill and slay, against the peace of our said Lady the Queen, her crown and dignity.

Second count.

Second Count.—The same as the first, except that it charged the acts of omission only.

Third count.

Third Count.—The same as the first, but charging acts of commission only.

Fourth count.

Fourth Count.—The jurors aforesaid further present, that heretofore and during all the days and times hereinafter in this count mentioned, J. A. hereinafter in this count mentioned, was a poor, indigent and destitute infant child of a tender age, to wit, of the age of six years, and unable to provide himself with necessary food, shelter or clothing, or any of the necessities of life, and that heretofore, to wit, on the said 28th day of October, in the year of our Lord, 1848, the said P. B. D. being the keeper of the said asylum, in the first count of this indictment mentioned, to wit, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, voluntarily received the said J. A. into the charge and custody of him the said P. B. D., and the said P. B. D. thenceforth and on and from the said 28th day of October, and upon and during all the days and times between that day and the 5th day of January, in the year of our Lord, 1849, kept and detained the said J. A., and the said J. A. continued, remained, and was under the care, charge, dominion, government, custody and control of the said P. B. D., in the said asylum, to wit, at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, and the said J. A. was, during all the several days and times in this count aforesaid, wholly subject to and depended upon the said P. B. D. for abode, shelter, lodging, sleeping accommodation, meat, drink, food and clothing, and was unable to obtain the same, or any of them, from any other source or from any other person or persons whomsoever. And the jurors aforesaid do further present, that the said P. B. D., on the several days, in this count aforesaid, at the parish of Tooting, aforesaid, and within the jurisdiction of the said Central Criminal Court, in and upon the said J. A., in the peace of God and our said Lady the Queen, then and there being, feloniously did make divers assaults, and that the said P. B. D., upon and during all and

every the days in this count aforesaid, and during all the said time whilst the said J. A. remained and continued under the care, charge, dominion, government, custody and control of the said P. B. D., in the said asylum, as in this count mentioned, at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, feloniously did omit, neglect and refuse to furnish, provide or supply the said J. A. with meat and drink in sufficient quantities for the support, nourishment and sustenance of the body of the said J. A., according to the duty of the said P. B. D., in that behalf; but on the contrary thereof, upon and during all and every the days in this count aforesaid, and during all the time in this count aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, feloniously and without any lawful excuse whatsoever, did furnish, provide and supply the said J. A. with food, meat and drink in very insufficient and inadequate quantities, and in no sufficient adequate quantity whatsoever for such support, nourishment, and sustenance of the body of the said J. A., as in this count aforesaid, and that the said P. B. D., upon and during all and every the days in this count aforesaid, and during all the said time whilst the said J. A. remained and continued under such charge, care, dominion, government, custody and control, as in this count aforesaid, in the said asylum, at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, feloniously did omit, neglect and refuse to furnish, provide or supply the said J. A. with such proper and suitable lodging, shelter and abode, as was, upon all and every the days in this count aforesaid, and during all the said last-mentioned time, needful for the said J. A., and necessary to preserve him in a good state of bodily health, according to his duty in that behalf, but on the contrary thereof, the said P. B. D., upon all the several days and times in this count aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, knowingly and feloniously did force, compel and oblige the said J. A. to be and remain for divers long spaces of time, in divers ill-ventilated and unwholesome rooms and apartments, then overcrowded with an excessive and injurious number of other persons in the said asylum, and feloniously did expose the said J. A., and force, oblige and compel the said J. A. to be and remain exposed for divers long spaces of time to divers fetid, injurious, noxious, unwholesome and pestilential vapours and exhalations in, near to, around and about the said asylum, then arising and existing; and that the said P. B. D., upon and during all and every the days in this count aforesaid, during all the time whilst the said J. A. remained and continued under such charge, care, dominion, government, custody and control of the said P. B. D., as in this count aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, feloniously did omit, neglect and refuse to furnish, provide or supply the said J. A. with such bedding and sleeping accommodation as was necessary to enable the said J. A., on all and every the said several days in this count aforesaid, to enjoy a due quantity of wholesome, healthy and refreshing rest and sleep, according to the duty of the said P. B. D. in that behalf; but on the contrary thereof, upon divers nights during the time in this count aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, feloniously and knowingly did force, oblige and compel the said J. A. to lie and be in a certain ill-ventilated and unwholesome room, then overcrowded with an excessive and injurious number of other persons, and to be and remain

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for divers long spaces of time in divers fetid, injurious, noxious, unwholesome and pestilential vapours and exhalations in the said room then arising and existing, and also to lie and be in a certain small bed in the said room, together with two other persons, to wit, J. A. and W. D., whereby the said bed became and was on all and every of the said nights totally unfit for and incapable of affording the said J. A. any wholesome, healthy or refreshing sleep whatsoever, and that the said P. B. D., not regarding his duty in that behalf, upon all and every the days in this count aforesaid, and during all the said time whilst the said J. A. remained and continued under such charge, care, dominion, government, custody and control, as in this count aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, feloniously did omit, neglect and refuse to furnish, provide or supply the said J. A. with a sufficient quantity of any clothing or covering whatsoever, for the protection of the body of the said J. A. from the cold, damp and inclemency of the weather, according to the duty of the said P. B. D. in that behalf, but on the contrary thereof, during divers of the said days in this count before mentioned, which were cold, damp and inclement, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, feloniously and contrary to his duty in that behalf, left the said J. A. exposed, and then and there suffered and permitted the said J. A. to be and remain exposed for divers long spaces of time without any sufficient or adequate quantity of clothing or covering for his body, but with a totally inadequate and insufficient quantity of clothing and covering for the body of the said J. A., to protect him from the severity and inclemency of the weather, by reason and means of which said several felonious acts, defaults and omissions of the said P. B. D. in this count before alleged, the said J. A. afterwards, to wit, on the 5th day of January, in the year of our Lord 1849, at the parish of Tooting aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, became and was, and the said P. B. D. did thereby then and there feloniously cause and occasion the said J. A. to become and be mortally sick, weak, diseased, disordered and distempered in his body. Of which said last-mentioned mortal sickness, weakness, disease, disorder and distemper, the said J. A., on and from the said last-mentioned day until the 6th day of January, A.D. 1849, as well at the parish of Tooting aforesaid, and within the jurisdiction of the said court, as at the parish of St. Pancras, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, did languish, and languishing did live, and then on the said last-mentioned day, in the year of our Lord 1849 aforesaid, at the parish last aforesaid, in the county of Middlesex aforesaid, and within the jurisdiction of the said Central Criminal Court, of the said last-mentioned mortal sickness, weakness, disease, disorder and distemper did die; and so the jurors aforesaid, upon their oath aforesaid, do say that the said P. B. D., him the said J. A., in manner and form in this count mentioned, feloniously did kill and slay against the peace of our said Lady the Queen, her crown and dignity.

Fifth count. *Fifth Count.*—Same as the fourth, except that it charged acts of omission only.

Sixth count. *Sixth Count.*—Same as the fourth, but charging acts of commission only.

Seventh count. *Seventh Count.*—And the jurors aforesaid further present that heretofore, to wit, on all the days and times hereinafter in this count men-

tioned, J. A., hereinafter in this count mentioned, was a poor indigent and destitute infant child, of very tender age, to wit, of the age of six years, and was totally unable to provide for or take care of himself, and during all the days and times in this count mentioned, was in a sick, feeble and disordered state of health, and required, for the purpose of enabling him to recover bodily health and strength, to be kept in a pure and healthy atmosphere, and some airy and well ventilated place or places; and the jurors aforesaid, upon their oath aforesaid, do further present, that on and from the 2nd of January, in the year of our Lord 1849, until the 5th day of the same month, the said J. A. was in and under the care, charge, dominion, government, control and keeping of the said P. B. D., in the said asylum, in the first count of this indictment mentioned, for reward to the said P. B. D. in that behalf, and that during all the time the said J. A. remained under such charge, care, dominion, government, custody and control as in this count aforesaid, it was the duty of the said P. B. D. to furnish and provide the said J. A. with such healthy and wholesome shelter, lodging and sleeping accommodation, as should be necessary to enable the said J. A. to recover his bodily health and strength. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said P. B. D., upon the said 2nd day of January, in the year of our Lord 1849, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, in and upon the said J. A., in the peace of God and our said Lady the Queen then and there being, feloniously did make an assault; and the said P. B. D., then and there, and upon all the days in this count before mentioned, and during all the time whilst the said J. A. was so under the care, charge, dominion, government, control and keeping of the said P. B. D., as in this count aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, feloniously and contrary to his duty in that behalf, did keep, confine and detain the said J. A. in divers close, confined and ill-ventilated rooms in the said asylum, and which, during all the time last aforesaid, were rendered and were impure, unhealthy, unwholesome and unfit for the said J. A. to inhabit, by reason of their being overcrowded with a large, excessive, and injurious number of other persons, and also during divers nights during the time last aforesaid, feloniously did force, compel and oblige the said J. A. to lie, remain, and be in a certain close and confined and ill-ventilated bed-room, which also was on all the said nights impure, unwholesome and unhealthy, by reason of divers impure, injurious, noxious and pestilential vapours and exhalations in the said last-mentioned bed-room, then arising, existing, and being, by reason and by means of which said several felonious acts and defaults of the said P. B. D., in this count mentioned, the said J. A. afterwards, to wit, on the 5th day of January, in the year of our Lord 1849, at the parish of Tooting aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said Central Criminal Court, became and was mortally sick, weak, diseased, disordered and distempered in his body, of which said last-mentioned mortal sickness, weakness, disease, disorder and distemper, the said J. A., on and from the day last aforesaid until the 6th day of January in the same year, as well at the parish of Tooting aforesaid, and within the jurisdiction of the said Central Criminal Court, as at the parish of St. Pancras, in the county of Middlesex aforesaid, and within the jurisdiction of the said Central Criminal Court, did languish, and languishing did live, and then on the said 6th day of January, in the year of our Lord 1849, at the parish last

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aforesaid, and within the jurisdiction of the said court, of the said last-mentioned mortal sickness, weakness, disease, disorder and distemper, did die. And so the jurors aforesaid, upon their oath aforesaid, say that the said P. B. D., him the said J. A., in manner and form in this count aforesaid, feloniously did kill and slay, against the peace of our said Lady the Queen, her crown and dignity.

Eighth Count.—And the jurors aforesaid further present, that heretofore, and at the time of the committing of the offence by the said P. B. D., and during all the times hereinafter mentioned, J. A. hereinafter in this count mentioned, was a poor indigent and destitute child of a tender age, to wit, of the age of six years, and totally unable to support, provide for and take care of himself; and the said P. B. D., at his request, had the care, charge, possession and custody of the said J. A., and had undertaken the support and maintenance of the said J. A. and the finding and providing the said J. A. with reasonably sufficient and proper victuals, food, drink, board, clothing and lodging, for reward to the said P. B. D. in that behalf, to wit, within the jurisdiction of the said Central Criminal Court; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said P. B. D., on the said 28th day of October, in the year of our Lord 1848, and on divers days and times aforesaid, to wit, and before the death of the said J. A., as hereinafter mentioned, at the parish of Tooting aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said J. A. feloniously did make divers assaults, and knowingly, wilfully and feloniously did put, place, keep and lodge the said J. A. for divers long spaces of time, to wit, for and during the whole of those days and times in divers rooms and apartments, then and during all that time greatly and excessively overcrowded, overcharged and filled to excess with divers and very many other infants and persons, and then also being in an ill-ventilated, impure, foul, unwholesome, unhealthy state, and in an unfit and improper state for the said J. A. to be put, placed, kept and lodged in, and unfit for the habitation of man, and also on the said days and times at the place aforesaid, within the jurisdiction of the said court, wilfully and feloniously did neglect, omit and refuse to give and administer to, or find and provide the said J. A. with, and to suffer and permit to be given and administered to, or found and provided, the said J. A. with reasonably sufficient and proper victuals, food, drink and clothing necessary for the sustenance, support and maintenance of the body of the said J. A., by means of which said placing, keeping, putting and lodging the said J. A. in the said rooms and apartments, and also by means of which said neglecting, omitting and refusing to give and administer to, or find and provide, the said J. A. with such reasonably sufficient and proper victuals, food, drink and clothing, as were necessary for the sustenance, support and maintenance of the body of the said J. A., he the said J. A. afterwards, to wit, on the 5th day of January, in the year of our Lord 1849, at the place aforesaid, in the county aforesaid, and within the jurisdiction of the said court, became and was mortally sick and ill, weak, diseased, disordered and distempered in his body, and of which said last-named mortal sickness, illness, weakness, disease, disorder and distemper, the said J. A. on and from the day and year last aforesaid, until, to wit, the 6th day of January, in the year of our Lord 1849, as well at the parish of Tooting aforesaid, and within the jurisdiction of the said court, as at the parish of Saint Pancras, in the county of Middlesex, and within the jurisdiction of the said court,

did languish, and languishing did live, and then, to wit, on the day and year last aforesaid, at the parish last aforesaid, in the county last aforesaid, and within the jurisdiction of the said court, of the said last-named mortal sickness, illness, weakness, disease, disorder and distemper did die. And so the jurors aforesaid, on their oath aforesaid, do say, that the said P. B. D., him the said J. A. in manner and form in this count aforesaid, feloniously did kill and slay, against the peace of our Lady the Queen, her crown and dignity.

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Ninth Count.—And the jurors aforesaid further present, that before and at the time of the committing of the offence by the said P. B. D., and during all the times hereinafter mentioned, J. A., hereinafter in this count mentioned, was a poor, indigent and destitute child of a tender age, to wit, of the age of six years, and wholly unable to support, provide for and take care of himself; and the said P. B. D., at his request, had the care, charge, possession and custody of the said J. A., and had undertaken the support and maintenance of the said J. A., and the finding and providing the said J. A. with reasonably sufficient and proper board and lodging, for reward to the said P. B. D. in that behalf, to wit, within the jurisdiction of the said Central Criminal Court; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said P. B. D., on the said 28th day of October, in the year of our Lord 1848, and on divers days and times afterwards and before the death of the said J. A., as hereinafter mentioned, at the parish of Tooting aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said J. A. feloniously did make divers assaults, and knowingly, wilfully and feloniously did put, place, keep and lodge the said J. A. for divers long spaces of time, to wit, for and during the whole of those days and times in divers rooms and apartments, then and during all that time greatly and excessively overcrowded, overcharged, and filled to excess with divers and very many other infants and persons, and then also being in an ill-ventilated, impure, foul, unwholesome and unhealthy state, and in an unfit and improper state for the said J. A. to be put, placed, kept and lodged in. By means of which said putting, placing, keeping and lodging the said J. A. in the said rooms and apartments, he the said J. A. afterwards, to wit, on the 5th day of January, in the year of our Lord 1849, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, became and was mortally sick and ill, weak, diseased, disordered and distempered in his body, and of which said last-mentioned sickness, illness, weakness, disease, disorder and distemper the said J. A., on and from the day and year last aforesaid, until, to wit, on the 6th day of January, in the year of our Lord 1849, as well at the parish of Tooting aforesaid, and within the jurisdiction of the said court, as at the parish of Saint Pancras, in the county of Middlesex, and within the jurisdiction of the said court, did languish, and languishing did live, and then, to wit, on the day and year last aforesaid, at the parish last aforesaid, in the county last aforesaid, and within the jurisdiction of the said court, of the said last-mentioned mortal sickness, illness, weakness, disease, disorder and distemper did die. And so the jurors aforesaid, on their oath aforesaid, do say, that the said P. B. D., him the said J. A., in manner and form in this count aforesaid, feloniously did kill and slay, against the peace of our Lady the Queen, her crown and dignity.

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An accessory after the fact indicted in the ordinary way with the principal felon, may, since the 11 & 12 Vict. c. 46, s. 2, be tried before the principal.

Where an accessory after the fact to a charge of sending threatening letters, is tried in the absence of the principal, the letters so written and sent by the principal are evidence on the trial.

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By the statute 11 & 12 Vict. c. 11, it is enacted, that every person who shall, after the day named in a notice specified by the act, have in his, her, or their custody, power, or possession, any gun, pistol, or other firearm, or part or parts of any gun, pistol, or firearm, or any sword, cutlass, PIKE, or bayonet, or any bullets, gunpowder, or ammunition, contrary to the provisions of the act, shall be guilty of a misdemeanor.

Held, that a pike-head about ten inches long, capable of being grasped in the hand, and used offensively, but which had no pike-staff or handle attached to it, though it was fitted to receive one, was a pike within the meaning of the statute, notwithstanding the separate enumeration in the previous statute, 47 Geo. 3, sess. 2, c. 54, ss. 10, 11, of pikes and pike-heads. *Reg. v. Render*, 158

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The prisoners were indicted for an assault
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under the statute 27 Geo. 3, c. 15, which makes it felony to make use of any force, or inflict any manner of bodily harm or punishment whatsoever, to deter any person from giving evidence; the evidence was, that the prosecutor, while detained in gaol as a witness against certain persons, was frequently spoken to on the subject by the prisoners, called a spy and informer, and told not to prosecute, and two days after was assaulted and beaten by them, no allusion being made to the subject during the assault.

Held, that the charge of felony under the statute was not sustained. *Anon.* 137

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R. B. was indicted, with three others, for an assault with intent to do some grievous bodily harm. It was proved that he, with the other prisoners, had assaulted the prosecutor, and afterwards they had returned together and picked up some stones. Then R. B. withdrew, and the other prisoners threw the stones and wounded the prosecutor. The jury found the three prisoners who threw the stones, guilty of the felony, and R. B. guilty only of a common assault.

Held, that R. B. was rightly convicted. *Reg. v. Phillips and others*, 225

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On an indictment for a common assault, the following verdict was returned;—"Guilty; the child being an assenting party, but that, from her tender years, she did not know what she was about."

Held, that the defendant ought to have been acquitted. *Reg. v. Read and others*, 266

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A society composed exclusively of attorneys practising in the county of K., prosecuted the clerk of a board of guardians, who, without being qualified as an attorney, conducted an appeal to the quarter sessions of the county of K., on behalf and at the request of the guardians.

Held (Coleridge, J. dissentiente), that the society was a "party grieved" within the 5 & 6 Will. & M. c. 11, s. 13. *Reg. v. Buchanan*, 427

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Held, that though it appeared there was a hole broken in the window, large enough to admit a man's head and shoulders, there was no evidence to show that there had been any actual entry, no property being lost. *Reg. v. Meal*, 70

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tment charged that one C. L. was a d had in his possession vats and dye; at the defendants were employed by l C. L. as his servants, &c., and that their duty to use the said vats and the profit and advantage of the said id for the dyeing, &c. of such woollen, l other materials as might belong to ves, or be entrusted to them by the L. for the purposes aforesaid, and he vats and dye for no other purpose, on no other materials; and that the nts conspired fraudulently and with- consent of C. L. to use the said vats, he dyeing of materials not belonging selves, and not entrusted to them by for that purpose, and to obtain for lves profits, and to deprive C. L. of per use of the said vats and dye; and . pursuance of that conspiracy the ants did wilfully, and without the t of the said C. L., receive materials, ilfully and without the consent of at his expense and with his dye, vats, re the said materials for their own

l, good in arrest of judgment; and it was unnecessary to prove the overt e objection that the offence of con- was merged in a felony did not arise he face of the indictment; though, if arisen, it could not have been sus-

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n indictment charges an ordinary con- , it is not necessary to prove a com- lesign between the defendants before g the acts of each defendant, for the f each defendant are only evidence t himself, and may be the only means ablishing the conspiracy. In high n, the overt act of one is the overt act ; and therefore, a common design in such cases, precede the proof of lual acts. *Reg. v. Brittain and another*,

RUPT APPOINTMENT TO AN OFFICE.

tment, under 49 Geo. 3, c. 126, s. 3,

charged the defendant with receiving money "for the appointment and nomination of A. B. to a certain office, commission, place, and employment, then being under the appointment and control of the East India Company, to wit, the office, commission, place, and employment of a cadet in the service of the East India Company." It was proved that the directors of the East India Company in turn nominated persons as cadets, and certified that they were eligible for that station, and that the persons so nominated were always appointed by the company; that, upon this appointment they received a certificate which, upon their arrival in India, entitled them, as vacancies occurred, to commissions in the military service of the company.

Held, that a cadetcy was, within the meaning of the statute, an "office, commission, place, and employment." *Reg. v. Charretie and others*, 499

CORRUPT RECEIVING OF REWARD FOR HELPING TO STOLEN GOODS.

Upon the trial of an indictment under 7 & 8 Geo. 4, c. 29, s. 58, which charged the corrupt receiving of money as a reward for helping to stolen goods, it was proved that the house of the prosecutrix had been robbed of cheeses, that the prisoner called upon her, and told her that he had some suspicion of the persons who had committed the robbery; that he proposed and executed a plan by which he brought to her house the persons whom he suspected, and the prosecutrix recognised them as persons who had been in her house the day before the robbery. She then said that she wished he could buy a bit of cheese of them, to which the prisoner assented; and received 3*l*. for the purpose. The jury found that the prisoner knew the thieves, and assisted the prosecutrix at her request in endeavouring to purchase from them the stolen property, not meaning to bring them to justice.

Held, that he "corruptly received" the money within the meaning of the statute. *Reg. v. Pascoe*, 462

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CROWN AND GOVERNMENT
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INDICTMENT.

The indictment charged in one set of counts, that the prisoner did feloniously compass, imagine, invent, devise, and intend to deprive and depose our Sovereign Lady the Queen, from the style, honour, and royal name of the imperial crown of the United Kingdom; and the said felonious compassing, imagination, invention, device, and intention did express, utter, and declare by then and there feloniously publishing certain printings in a certain public newspaper called the *Irish Felon*; and in another set of counts the prisoner was charged in similar terms with compassing to levy war against Her Majesty.

Held, upon writ of error, that the indictment well charged an offence under the statute 11 Vict. c. 12; and that it was not necessary either to aver that the printings therein charged were felonious printings, or further to aver that they were expressive and declaratory of the previously charged compassings and imagination, or that they were published "of and concerning" Her Majesty the Queen, and the Crown and Government of the United Kingdom, or of and concerning some traitorous or felonious design then on foot, or intended to be taken. *John Martin v. the Queen*, 318

On a trial for felony the prisoner is entitled to have the indictment read over slowly once, and once only.

The prisoner is not entitled to a copy of the jury panel; a juror cannot be examined on the *voire dire* without cause being first shown. To constitute a levying of war under the 11 & 12 Vict. c. 12, it is not necessary that there should have been any actual conflict. Any attempt by force or intimidation to interfere with the free action of the Government is a "levying war" within the meaning of the above act. Any attempt to substitute another form of Government for the existing one, or to dismember the United Kingdom, is sufficient to sustain a count under the above act charging the intent to be to depose the Queen, &c.

If several persons join in the same conspiracy, some intending by the means employed to force the Government to change

their measures, whilst the object of others is to sever Ireland from England, each is responsible for both intents. A person who enters into a conspiracy for the sole purpose of detecting and betraying it, does not strictly require confirmation as an accomplice, although his evidence should be received by the jury with caution. *Reg. v. Dowling*, 509

A prisoner charged under the above act is not of right entitled to a copy of the indictment, nor would the court exercise its discretion in his favour by awarding him a copy *ex gratia*: (*Erle, J.*)

A prisoner indicted for felony is not entitled to a list of the names and addresses of the witnesses on the back of the indictment, but he will be allowed to inspect the indictment for the purpose of seeing the names of such witnesses: (*per Erle, J.*) No juror can be challenged until a full jury appear in the box. The prisoner may, by permission of the court, have the jury panel read over before he is called upon to exercise his right of challenge. A jurymen cannot be asked whether he has not acted as a special constable during the disturbances connected with the charge in the indictment—but *semble*, he may be asked whether he has ever expressed an opinion as to the guilt of the prisoners.

A witness for the prosecution proved that he attended a meeting at which several conspirators were present, but none of the prisoners were there: he received at that meeting a leaf of a book from one of those present, named Bezer, which was to serve as a passport to a meeting to be held a week or two afterwards. He attended the second meeting, produced the leaf that had been given him, and was admitted. The prisoners were not present, nor were they shown to have joined the conspiracy at that time.

Held, that the witness might state the substance of what Bezer told him when he gave him the leaf, and also what passed at the second meeting.

It was proved that on the evening of the 16th August, the time which had been fixed by the conspirators for a general outbreak, a large number of armed men were found assembled in a public house in Webber-street. None of these men had been previously connected by the evidence with the conspiracy, neither did it appear that the house had ever been recognised as a place of meeting.

Held, that what was done and what was found in that house, were admissible in evidence. *Reg. v. Lacey and others*, 517

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DISORDERLY HOUSE.

A room within twenty miles of the cities of London and Westminster, used for the purpose of music and dancing, and to which the public are admitted on payment of money, is a disorderly house within the 25 Geo. 2, c. 36, s. 2, unless it has been duly licensed, although no improper or disorderly conduct is allowed in the said room.

The onus lies upon the defendant of proving that he has a licence. One of the defendants had his name over the house as a free vintner, and another had contracted to supply the visitors with refreshments, but neither took any acting part in the management, although they were sometimes seen in the room.

Held, that they were not shown to be persons having the management within the 8th section. *Reg. v. Wolf and others*, 578.

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EAST INDIA COMPANY.

An information against an officer of the East India Company for receiving gifts, under 33 Geo. 3, c. 52, s. 62, which follows the words of the statute, is sufficient after verdict, and it is unnecessary to allege the receipt of the money to have been extorsive or *colore*

officii, or whose money was received, or (Platt, B., dubitante,) to negative that it was received for the use of the Queen.

The judgment for the offence was, that the defendant should pay a fine, and should forfeit a sum of money being the full value of the gift, and that defendant should be imprisoned until he should have paid the fine and forfeiture. The gift consisted of rupees, and their value at the time of the receipt of them was found by the jury.

Held, first, that as the gift was money, there was no option to exercise, whether the gift or the value of it should be forfeited, and that therefore the judgment was right; secondly, that the value of the rupees was properly estimated at the time when the defendant received them; and, thirdly, that the forfeiture being part of the punishment, the court had power to order imprisonment until it was paid. *Douglas v. The Queen*, 163

EMBEZZLEMENT.

EVIDENCE.

Where there has been a written agreement between master and servant, in which the nature of the service is defined:

Held, on an indictment for embezzlement against the latter, that parol evidence of the service was inadmissible, unless notice had been given to produce the agreement. *Reg. v. Clapton*, 126

If a servant, in the course of his employment, receives from a fellow servant the money of his master, and his duty being to hand it over to another servant of the prosecutor, by whom it would be delivered to the master, he fraudulently intercepts it in its passage and appropriates it, he is guilty of embezzlement. *Reg. v. Masters*, 178

EMBEZZLEMENT BY AGENTS.

If any chattel or valuable security is entrusted to any broker or agent originally for the purpose of sale, but the authority to sell is afterwards countermanded, and the broker or agent, notwithstanding that countermand, sells the goods in violation of the orders of his principal, such broker or agent may be convicted of misdemeanor, under stat. 7 & 8 Geo. 4, c. 29, s. 49. *Reg. v. Gomm*, 64

EVIDENCE.

CONFESSION.

The prosecutor, in the presence of the constable, said to the prisoner, "It will be better for you to tell the truth, as it will save the shame of a search warrant in your house." The statement was rejected. The constable then

took the prisoner into a loft, and in the absence of the prosecutor, the prisoner made a statement. The evidence was rejected. Half an hour after, the constable took the prisoner to the station-house, and on the way cautioned him not to say anything, after which he made a statement.

Held, to be inadmissible, as the inducement was still operating. *Reg. v. Collier and another*, 57

A statement made by one of two prisoners to the other after an inducement suggested by that other in the presence of the constable in whose custody they are, and uncontradicted by the constable, is inadmissible in evidence. *Reg. v. Miller and another*, 507

DYING DECLARATION.

Where the deceased having said that he thought he should die, made a statement, and two or three days afterwards expressed his belief that he should recover, and he lived some days after that:

Held, that the statement was inadmissible. *Reg. v. Taylor and another*, 84

DEPOSITION OF DECEASED WITNESS.

Quere.—Is the deposition of a witness before the committing magistrates, where the attorney for the prisoner abstains from asking any question, in consequence of the witness being too ill to hear any further examination, sufficiently complete to render it evidence against the prisoner where the witness dies before the trial? *Reg. v. Hyde*, 90

OF A DISTINCT FELONY.

Evidence of a distinct felony may be given in re-examination where it will serve to explain an apparently contradictory fact elicited by cross-examination. *Reg. v. Chambers*, 92

CONFESSION.

A statement of a prisoner is admissible in evidence, although he was previously told that whatever he said "would be used against him." *Reg. v. Chambers*, 92

Upon the trial of an indictment for attempting to poison, the only evidence of intent was a confession proved by a medical man, he denying at first that he had held out to the prisoner any inducement to make the statement. It was afterwards proved by another witness, that before the statement was made, the surgeon had said to the prisoner in the presence of her mistress (whom she had attempted to poison), "it will be better for you to tell the truth;" and the surgeon, on being recalled, admitted that he might have said so. The learned judge refused to with-

draw the confession from the jury, and the prisoner was convicted; but the learned judge reported, that if the surgeon had in the first instance stated that he had used that expression to the prisoner, he should not have received the confession.

Held, that the conviction was wrong. *Reg. v. Garner*, 175

PRACTICE.

Where a witness for the prosecution has given an account of what was said by the defendant at a particular transaction, and a witness is called for the defence to give a different one, it is not allowable for the defendant's counsel to put to him the precise words used by the first witness, and ask if they were uttered; but the witness should be called upon in the first instance to give his version of the matter, and when he has so done, he may be asked whether this or that expression was used. *Reg. v. Fussell*, 291

A person was in the habit from time to time, and within two hours of their occurrence, of reporting to a police inspector proceedings that had taken place at certain meetings where a treasonable conspiracy was carried on. The inspector took down the purport of the report from his dictation, but not in the very words he used. When finished, some of the reports were read over by the witness, and some were read to him, and all were signed by him.

Held, that on examination he might use those reports for the purpose of refreshing his memory,

A person employed by Government to mix with conspirators, and pretend to aid their designs for the purpose of betraying them, does not require corroboration as an accomplice.

In general, witnesses to character cannot be examined after verdict and before sentence, where the defendant might have examined them upon the trial. *Reg. v. Mullins*, 326

CORONER'S STATEMENT.

Where a prisoner had made a statement which accounted for the possession of stolen property before search made, or any suspicion created, held, admissible for him. *Reg. v. Abraham*, 430

Semble, the rule of evidence which prohibits an attorney who has received documents from a client in a professional character from producing them in evidence against that client, applies to documents which are the subject-matter of the charge.

The rule extends to cases where the attorney has a lien upon the documents.

Notice to produce a document, served upon the defendant's solicitor the day before the trial, but after the commencement of the assizes, is sufficient to let in secondary evidence. *Reg. v. Hawkins*, 434

DEPOSITIONS OF ABSENT WITNESS.

Upon the trial of an indictment for false pretences, a witness being ill, her deposition, taken before the committing magistrate, was tendered in evidence. The caption of that deposition stated that it was taken before the committing magistrate in the presence of the prisoner, on a charge "for obtaining money, and valuable securities for money, from M. R.;" not saying illegally or by false pretences. It was objected that it was not admissible, because no offence was shown to have been charged.

Held, that it was admissible; as it sufficiently appeared from the examination itself, that it related to the charge upon which the prisoner was being tried. *Reg. v. Langbridge*, 465

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EXTORTION.

EVIDENCE OF

On the trial of an indictment for accusing a person of an unnatural crime with intent to extort money—the prisoner being a soldier, and the accusation having been made while he was on duty as sentry—evidence of declaration made by him on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard-house and accuse him of an unnatural crime, was held admissible.

The prisoner was proved to have made the accusation in these words, "I charge this man with indecently assaulting me."

Held, that it was a question for the jury—taking into consideration the prisoner's conduct throughout the transaction—whether by those words he did not mean to allege that the prosecutor had solicited him to the commission of an unnatural offence. *Reg. v. Cooper*, 547

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FALSE PRETENCES.

Where an indictment charges a false pretence of an existing fact calculated to induce the confidence which led to the prosecutor's

parting with his property, though mixed up with false pretences as to the prisoner's future conduct, it is sufficient.

Where the false pretence is as to the status of the party at the time, or as to any collateral fact supposed to be then existing, it will equally support an indictment under the statute. *Reg. v. Bates and another*, 211

On an indictment for false pretences, it was proved that the prisoner was foreman to the prosecutor, and that as such foreman it was his duty to keep an account of the work done by the men, and to obtain at the end of the week a cheque from his master for the sum due to the men for wages, and pay them accordingly. On the day in question he demanded and received a cheque for a larger amount than the correct one, alleging that such larger amount was due, and he appropriated the balance to his own use.

Held, that the evidence supported the charge.

Quere, whether an indictment which charges the defendant with having obtained an order for the payment of money with intent to cheat and defraud the prosecutor of part of the proceeds of the same is within the 7 & 8 Geo. 4, c. 29, s. 53? *Reg. v. Leonard*, 284

The omission of the word "knowingly," in an indictment for false pretences, is no objection in arrest of judgment; even if it would be on demurrer. An indictment for false pretences charged that J. B., on, &c., at, &c., unlawfully did falsely pretend to H. that he had caused a writ of right to be issued at the suit of M. W. (the mother of the said H.) and others for the purpose of establishing the right of the said M. W. and others to a certain estate; and then requested the said H. to advance the said J. B. some money towards carrying on the said action: by means of which said false pretences the said J. B. did then and there unlawfully obtain from the said H. the sum of 1*l.*, &c., with intent to cheat and defraud the said H. of the same. Whereas in truth and in fact the said J. B. had not and never has caused a writ of right or any other writ whatsoever to be issued at the suit of the said M. W. and others, or at the suit of the said M. W. alone; and there was then no action commenced or to be carried on, in which the said M. W. was in any way interested:

Held, a good count after verdict.

Semble, per Lord Denman, C. J., that it would be good upon demurrer; and that *R. v. Henderson* (2 Moo. C. C. 192), is wrongly decided. *Reg. v. Bowen*, 483

A railway ticket entitling a passenger to travel upon a railway to a certain place, without

any further charge, is a chattel of value, within the meaning of 7 & 8 Geo. 4, c. 29, s. 53; and a person obtaining such a ticket by false pretences from a servant of the railway company is guilty of a misdemeanour. *Reg. v. Boulton*, 576

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FORGERY.

The cheques of a provident society having different branches were drawn in the name of the society, and signed by the chairman and three of the committee of any branch of the society. They were then countersigned by the clerk of the whole society. The bankers did not know the names or signatures of the chairman or committee-men, but relied upon the counter-signature of the clerk as a voucher for their authenticity.

Held, that a forgery of the signatures of the chairman and three members of the committee of a branch of the society, by means of which the genuine signature of the clerk was obtained, was a forgery of a warrant or order for the payment of money. *Reg. v. Lee*, 80

Quere—On an indictment for uttering a forged acquittance, not being an instrument of ordinary transmission from hand to hand, can similar instruments, uttered by the prisoner on other occasions, be given in evidence to prove a guilty knowledge? *Reg. v. James Phillips*, 88

An indictment for forging a will, charged as intent to defraud a person or persons unknown.

It was proved that the prisoner was the son of the deceased, whose will was forged; and although one of the witnesses stated that he had heard a rumour that the deceased had had another son by a former marriage, of whose existence, however, he knew nothing, except by report, there was no other evidence of any former marriage, or any children of such marriage.

Held, that there was not sufficient evidence of an intention to defraud any one, to support a conviction. *Reg. v. Tiffs and others*, 160

WARRANT OR ORDER.

A forged authority to draw money, which is well described as a "warrant," is not an "order" for the payment of the money, and an indictment describing such a forged authority for the payment of money as "a warrant and order," is bad. *Reg. v. Ann Dixon*, 289

On an indictment for forging an order for the delivery of goods, the instrument alleged to have been forged being an order on a dock company to permit the bearer to taste wines in the docks belonging to the alleged drawer :

Held, that the giving out at the docks a portion of the wine for the purpose of its being tasted there by the person presenting the order was a delivery of goods within the 1 Will. 4, c. 66, s. 10.

In the ordinary course of business at the docks, the tasting order being directed to the dock company, and being signed by the merchant owning the wines, is taken to a clerk at the docks who writes his name across it, and this signature is an authority to the cooper, without which he is not justified in acting.

Held, that such an instrument was an order as soon as it left the hands of the merchant properly drawn up, and that the signature of the dock clerk was not essential to give it validity as an order. *Reg. v. Illidge*, 552

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HIGH TREASON.

In the caption of an indictment for high treason, it was stated that the indictment was found "At a Special Session of Oyer and

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Terminer and General Gaol Delivery, holden in and for the County of Tipperary at Clonmel, on, &c., before the Right Honourable Francis Blackburne, Chief Justice of Her Majesty's Court of Chief Place in Ireland; the Right Honourable John Doherty, Chief Justice of Her Majesty's Court of Common Pleas in Ireland; and the Right Honourable Richard Moore, fourth Justice of Her Majesty's Court of Chief Place, in Ireland, Justices and Commissioners of our said Lady the Queen, of Oyer and Terminer, within her said County of Tipperary, nominated and appointed to inquire into, hear, and determine all, and all manner of treasons, &c., within the said County of Tipperary, and also nominated and appointed from time to time, as need should be, to deliver the gaols of our said Lady the Queen, of the said County of Tipperary, of all prisoners, &c., &c., being by virtue of a commission under letters patent of our said Lady the Queen, bearing date at Dublin, the first day of September, in the 12th year of the reign of our said Lady the Queen, to them the said Francis Blackburne, John Doherty, and Richard Moore, and others in the said letters named directed."

Held, on writ of error, that the caption sufficiently disclosed authority in the justices named to hold the sessions of themselves, though the commission was stated to have been directed to them and others.

Held, that to levy war against the Sovereign in Ireland is high treason in Ireland at common law, and also that the statute of 25 Edw. 3, stat. 5, c. 2, was extended to Ireland by Poyning's Act, 10 Hen. 7, c. 10.

The prisoners, who were indicted in five counts for levying war against the Queen in Ireland, and in a sixth for compassing the death of Her Majesty, on being arraigned, tendered pleas alleging that a copy of the indictment and list of the witnesses and jury panel, were not delivered to them ten days before the days of trial, and that they ought not now to be called on to plead, because of such non-delivery, concluding with a verification, and praying judgment that they might not now be compelled to answer the said indictment.

In fact, copies of the indictments were furnished five days before, but the lists were not delivered at all. These pleas, having been demurred to by the Attorney-General, were overruled by the court below.

Held, that they were rightly overruled, and that the prisoners were not entitled to a copy of the indictment more than five days before the trial, or to a list of the witnesses or jury panel at any period.

Held, that the 1st and 4th sections of the statute 57 Geo. 3, c. 6, are not extended to Ireland, and therefore that persons prosecuted in Ireland are not entitled to the benefits conferred by the statutes 7 & 8 Will. 3, and 7 Anne, c. 21, on persons accused of high treason.

Held, that in high treason a prisoner is not entitled to challenge more than twenty jurors peremptorily.

The record in each case averred that the prisoner was asked whether he now hath "anything to say for himself wherefore the said justices and commissioners ought not upon the premises and verdict aforesaid, to proceed to judgment against him," without saying "judgment of death," or "judgment and execution."

Held, that this was a sufficient demand notwithstanding. *W. Smith O'Brien v. The Queen*, 360

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HIGHWAY.

COSTS.

If upon the trial of an indictment for the non-repair of a highway, ordered by justices under 5 & 6 Will. 4, c. 50, s. 94, it appears that the road indicted is not the road set out in the order of justices, and the prosecution fails in consequence; the judge has no jurisdiction to certify for the costs under s. 95. *Reg. v. Inhabitants of Fifehead*, 59

EVIDENCE OF DEDICATION.

Public user of a road for fifty years is evidence from which a jury may infer a dedication, though it may not be clear in whom the ownership of the soil is vested. *Reg. v. Inhabitants of East Mark*, 60

OBSTRUCTION OF.

Upon an indictment for obstructing a public footway, it appeared that, before that public footway existed, the defendant's ancestors had been entitled to a carriage-way over the *locus in quo*; but on the part of the crown it was contended that the public user, inconsistent with the assertion of the private easement, had determined it. The learned judge told the jury that no interruption by the public for less than twenty years would destroy the private right.

Held, that that proposition, if presented to the jury as a rule of law or a conclusive presumption of fact, was erroneous, and a misdirection. The period of time is only ma-

terial as one element from which the grantee's intention to retain or abandon his easement may be inferred; and the sufficiency or insufficiency of the period in any particular case must depend upon all the accompanying circumstances.

The defendant claimed a way for horses and carriages to certain premises occupied by him, and situated on one side of the lane over which the way was claimed; and, as evidence of that right, he produced two old leases of premises situate on the opposite side of the same lane, which leases were granted by persons under whom he claimed and purported to convey with the premises a way to them down the lane for carriage and horses. No distinct act of user under these leases was proved.

Held, that they were admissible in evidence for the purpose of showing that the persons under whom the defendant claimed, being owners of property on both sides of the lane, had assumed to grant a right of way as owners of the lane, or as owners of the property leased to lease with it a right of way derived from some other source; but that they were inadmissible as evidence of reputation, or for the purpose of proving the right of way claimed by the defendant.

The court granted a new trial, although the verdict was for the defendant. *Reg. v. Chorley*, 262

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The prisoner was indicted under the statute 60 Geo. 3, c. 1, in several counts; first, for that he unlawfully was present and did attend a certain meeting and assembly dangerous to the peace and security of Her Majesty's liege subjects, and then and there prohibited by law, for the purpose of training and drilling to the practice of military exercises, movements and evolutions, divers persons, to wit, &c., and then and there did train and drill to the practice of military exercises, movements and evolutions the said persons, without any lawful authority from Her Majesty, or the Lieutenant, or two justices of the peace of the said county of the city of Dublin, or of any county or riding, or of any stewardry, or by commission or otherwise, for so doing.

And, secondly, that "he did then and there assist in training and drilling to the practice of military exercise," &c.

And, thirdly, that "he unlawfully did train and drill to the practice of military exercises, &c., the said persons being then and there assembled, without any lawful authority from her Majesty, or the Lieutenant, or two justices of the peace of the county of the city of Dublin, or of any county or riding, or of any stewardry, by commission or otherwise, for so doing.

Held, that all the counts of the indictment were erroneous: first, by reason of there being no averments in any of them that the meeting and assembly therein mentioned was a meeting of persons for the purpose of training and drilling themselves, or of being trained and drilled to the use of arms or for the purpose of practising military exercises, movements, or evolutions; and, secondly, there being no averment that the meeting in the indictment mentioned was a meeting held without any lawful authority from Her Majesty, or the Lieutenant, or two justices of the peace, &c., by commission or otherwise. *Gogarty v. the Queen*, 306

INDECENT EXPOSURE.

An indictment for a nuisance at common law charged that the defendant, at, &c., in, &c., did expose and exhibit his private parts, naked and uncovered, in the presence of M. A., the wife of C., and of divers others of the liege subjects, &c. The evidence was, that the defendant took out and exposed his private parts to M. A., and thereupon she directly ran off and told her husband: that there was no one in sight but herself when she saw his private parts exposed. The defendant was convicted.

Held, that as the exposure to one person only was not an offence at common law, the words of "divers others of the liege subjects," &c., were material to be proved; and that, as they had not been proved, the conviction ought to be quashed.

Semble, this court has authority, and is bound to examine the validity of an indictment, though no question is reserved thereon, and to quash the indictment if it is bad. *Reg. v. Webb*, 183

An indictment charged two defendants with indecent exposure of their persons in an open and public place.

Held, that an urinal with boxes or divisions for the convenience of the public, and situated in an open market, was not a public place within the meaning of the allegation.

An indictment alleged that A. "in a certain open and public place did lay his hands on the person and private parts of B. with intent to stir up in his own and B.'s mind unnatural and sodomitical desires and inclinations, and to incite B. to the committing and perpetrating with A. divers unnatural and sodomitical acts, and that B. in the said open and public place, did permit and suffer the said A. to lay his hands, &c., with the like intent."

Held, had, as not stating any offence with legal certainty. *Orchard v. another*, 248

INDICTMENT.

The prisoner was indicted in one set of counts for feloniously compassing, &c. to deprive and depose our Lady the Queen from the style, honour, and royal name of the Imperial crown of the United Kingdom, and, on certain days in the indictment named, feloniously expressing said compassings by feloniously publishing certain printings in a certain public newspaper, of which he was then and there the proprietor: and, in another set of counts, with feloniously compassing to levy war against the Queen, in order, by force and constraint, to compel Her Majesty to change her measures and counsels, and which feloniously expressing such last-mentioned compassings by feloniously publishing the same printings, and on the same days and in the same public newspapers as in the first set of counts mentioned.

Held, that the two felonies, though distinct, were properly joined in the indictment.

And *semble*, that the question in such cases is—not whether the felonies charged are distinct—but whether they are repugnant or so dissimilar in their nature and circumstances as, if joined, to be likely to embarrass the prisoner in his defence. *The Queen v. J. Mitchell*, 1

By the record of conviction in Q. B. upon an indictment for a common assault, it appeared that the indictment commenced thus: "the jurors of our Lady the Queen;" but the caption was in the usual form, stating them to be jurors "for our Lady the Queen." Error being assigned upon this ground:

Held, that the objection was not well founded.

The indictment, as set out, charged the commission of the offence "in the 10th year of our Sovereign Lady Victoria," &c., not saying "of the reign:"

Held, that the objection, if otherwise valid, was cured by stat. 7 Geo. 4, c. 64, s. 20. *Broome v. Reg.*, 49

In an indictment for maliciously shooting, under stat. 1 Vict. c. 84, s. 4, it is sufficient to say "with a certain loaded gun," without going on to state with what it was loaded. *Reg. v. Cox*, 58

In an indictment for the murder of "William Scarborough," it appeared that the deceased was the infant illegitimate son of the prisoner, Sarah Scarborough; that he was sometimes called "William" and "Coley," and was spoken of as "Sarah Scarborough's child," and on one or two occasions as "William Scarborough," in his mother's presence, and there was no proof that he had been baptised.

Held, that there was evidence to go to the jury that the deceased had acquired the name of "William Scarborough" by reputation. *Reg. v. Sarah Scarborough*, 72

The caption of an indictment stated that at an adjournment of a commission of Oyer and Terminer and General Gaol Delivery, holden in and for the county of the city of Dublin, at the Sessions House, Green-street, in the said county of the city of Dublin, on Tuesday, the 8th day of August, 1845, and in the 12th year of our Sovereign Lady the Queen, before the Right Honourable Jeremiah Dunne, Lord Mayor of the city of Dublin; the Right Honourable David Richard Pigot, Chief Baron of her Majesty's Court of Exchequer; and the Honourable Richard Pennefather, one of the Barons of Her Majesty's Court of Exchequer; and others their fellows, Justices and Commissioners of our said Lady the Queen, in and for the whole county of the said city of Dublin, assigned by letters patent, &c., directed to S. W., &c., &c., to inquire, examine, discuss, and determine, by the oath of good and lawful men of the county of the city of Dublin aforesaid, and by other ways and means, &c., of all treasons, suspicions of treasons, &c., &c., by any person or persons within the county aforesaid, done, committed, perpetrated, or hereafter to be done, &c., and to deliver the gaol of Newgate, and all other the gaols in the county of the city, of all malefactors and prisoners from time to time, and to hear and determine all and singular the premises—it was presented upon the oath of good and lawful men of the body of the said county of Dublin, whose names here follow—(setting out the names of twenty-three grand jurors)—in manner and form following:

Held, that this caption was not erroneous and that it appeared from it with sufficient certainty when, where, and before whom the oath was administered to the grand jury.

and when and where the presentment was made: and that the names of the grand jurors having been set forth in the caption it sufficiently appeared thereby that the bill was found by twelve grand jurors, though the number was not stated.

Held, also, that the caption was not vitiated by the omission of the words sworn and charged. *John Martin v. the Queen*, 318

In setting forth the indictment, the past tense was used: "it was presented," instead of "it is presented."

Held immaterial. *King v. the Queen*, 561.

An indictment charged the prisoner with stealing "one ham."

Held, that it sufficiently described an article which was the subject of larceny. *Reg. v. Gallears*, 572

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INFANT.

Exposure and desertion of

An indictment for leaving and deserting an infant child in a certain parish, with intent to injure and aggrieve the inhabitants of the said parish, is not sufficient, there being no allegation that the child was settled elsewhere, nor that the child received any

damage, or was likely to do so. *Reg. v. Cooper*, 559

INFORMATION.

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Under 33 Geo. 3, c. 52, s. 62; 163

INSANITY.

A mere uncontrollable impulse of the mind, co-existing with the full possession of the reasoning powers, will not warrant an acquittal on the ground of insanity. The question for the jury being, whether the prisoner, at the time he committed the act, knew the character and nature of the act, and that it was a wrongful one. *Reg. v. Barton*, 275

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JURISDICTION.

SPECIAL LOCAL COMMISSION.

An offence was committed within a separate locality, which had a body of justices exercising jurisdiction within the liberty, by virtue of three separate commissions; 1st, the ordinary commission of the peace; 2nd, a commission to try all treasons, misprisions of treasons, insurrections, murders, felonies, manslaughters, &c.; the 3rd, a general commission of gaol delivery. Neither of the commissions contained any non-intromittant clause, but the general county magistrates, in fact, exercised no jurisdiction within the liberty, which had a gaol and separate *custos rotulorum* and clerk of the peace.

Held, that these commissions did not oust the jurisdiction of Her Majesty's Justices of Gaol Delivery for the whole county; and

that the prisoner having been removed from the liberty by writs of *habeas ad deliberandum*, and *recipias corpus*, was properly tried by such justices. *Reg. v. Crane*, 53

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JURY.

The array was challenged on the grounds, *inter alia*, that the panel was arrayed partially, and to the prejudice of the prisoner; and that, for the purpose of depriving him of a fair trial, the names of jurors usually summoned, and of other jurors, had been omitted from the panel, because they were deemed more likely to acquit than to convict; and the names of other jurors were inserted therein, because they were deemed more likely to convict than to acquit.

Held, that the mere fact of the existence of a great disproportion between the relative number of persons of different religious persuasions upon the panel was, *per se*, no evidence in support of such a challenge.

By the stat. 3 & 4 Will. 4, c. 91, it is the duty of the recorder, at a special sessions in each year, to revise, in open court, the general list of jurors returned, pursuant to the statute, and to deliver it when so revised and signed by him, to the clerk of the peace, who gives a copy thereof to the sheriff, as the jurors' book for the ensuing year, and from which the sheriff is bound to form the jury panel.

The court held that a list of the jurors' names, checked off by the witness as they were in open court placed on the revised list by the recorder, but which was not compared with the revised list after it was signed by the recorder, or with the jurors' book, was not admissible as evidence of the contents of the jurors' book:

And refused to direct the book itself to be produced for the purpose of ascertaining the different religions of the jurors named therein, and comparing their relative number with the proportion in which jurors of the same persuasion appeared on the panel.

Held, that a juror whose name, though he was summoned to attend the court, was left off the panel, could not be asked what his religion was.

The triers are entitled to know whether, in the opinion of the court, there is any evidence to sustain such challenge. *The Queen v. J. Mitchell*.

A challenge of a juror may be allowed after he has been sworn. *Reg. v. Flint*, 66

A challenge was tendered to one of the jurors, on the ground that he was interested in the conviction of the prisoner, inasmuch as by a charter of Henry the Fifth, it was granted to the then corporation of Dublin, their heirs and successors (which charter, and the rights and franchises thereby granted, was averred to have become by the Municipal Corporations Act (3 & 4 Vict. c. 105), duly vested in the present corporation of the city of Dublin) that they "should have all and all manner of goods and chattels of felons and fugitives to be condemned or convicted within the said city of Dublin and the liberties thereof thereafter arising;" and that such goods and chattels were applicable to the purposes of the borough fund of the city of Dublin; and that the prisoner had within the city goods to the value of twenty shillings: and that William Duff was a burgess of said city, and occupier of certain hereditaments within the city liable to be rated to a borough rate; and that the borough fund was deficient after the payment of all the claims upon the corporation; and that, therefore, the juror was interested in the conviction of him the said John Martin.

This challenge was upon demurrer overruled.

Held, upon writ of error that it was rightly disallowed, and that the juror was not liable to objection, he not having, as a *burgess*, any direct personal interest in or control over the application or disposal of such goods and chattels, the disposal of which was vested, if at all, in the town council: nor yet as a *rate-payer*, for that it did not appear by the challenge that the preliminaries which were by the 133rd section of the statute essential to enable the council to impose a borough-rate, had been complied with, and at all events that his liability to be rated (if any) was a contingent liability to a future rate: and, therefore, did not affect his competence.

Quere, whether in such challenge the absence of an averment that the franchise has been lost or forfeited by *non user*, is not a fatal omission? *John Martin v. the Queen*, 315

If a juryman, on calling over the names of the panel, answer to a wrong name, and be sworn by the wrong name, the trial is a mistrial, for the prisoner has not had his opportunity of challenging the juryman mis-named. *Reg. v. Metcalfe and another*, 220

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JUSTICES OF THE PEACE.

Jurisdiction of, 53.

LARCENY.

In an indictment for stealing five pints of porter, it appeared that the prisoner was discovered standing by a barrel of porter, out of a hole in which the porter was running into a can on the ground, and that about five pints had run into the can.

Held, that there was a sufficient *asportavit* proved of the porter in the can. *Reg. v. Wallis*, 67

EVIDENCE—BAILMENT.

A. the bailee of B.'s mare, took her to a certain livery stable in the town of P. where B. was, paid to B. the balance of money due to him after deducting one pound due for the keep of the mare, and told B. that she was at the livery-stables. B. sent word to the stable-keeper not to let A. have the mare again; and on A. asking to be allowed to ride the mare to a certain place, twice told him never to put finger near her more, to which A. said, "Well." After B. had left the town, A. obtained the mare from the ostler at the livery-stables by a false story, and never returned her.

Held, that there was evidence to go to the jury that a change of possession of the mare had taken place after she had been left at the stables, and that the stable-keeper had become B.'s agent. *Reg. v. Steer*, 187

EVIDENCE OF.

In a portmanteau not proved to belong to a prisoner on trial was found a paper folded like a letter, and containing in the inside what purported to be an inventory of goods pawned at different times. The inventory was not in the prisoner's handwriting; but on the outside of the paper the prisoner's name, and the word "private," both in his handwriting, were indorsed.

Held, that the contents of the paper were not admissible in evidence against him. *Reg. v. Hare and another*, 547

BY FINDING.

Where lost property is found, the appropriation of it by the finder is not larceny, unless he knew, or had reasonable means of ascertaining, the owner.

Quere, whether, in the case of a bank note, the finder can be indicted for felony on the proof that, though he did not know the owner when he found the note, he did know him before he put it off? *Reg. v. Wood*, 277

If a man finds goods which have been actually lost, or which he reasonably supposes to have been lost, and takes possession of them, intending to appropriate them entirely to his own use, and there are no circumstances to rebut the presumption that he believed the owner could not be found, he is not guilty of larceny, even though he disposes of them after he has notice of the title of the real owner, for the original taking is lawful, and the subsequent conversion is not a trespass. If, on the other hand, there is a reasonable evidence of his belief, at the time of taking them, that the owner could be found, then the original taking is felonious. *Reg. v. Wood*, 453

RECEIVING—HUSBAND AND WIFE.

Where a wife was indicted with her husband for receiving stolen property, and the evidence was, that, although not present when her husband received the property, she had subsequently dealt with it, and ultimately destroyed it.

Held, that it was a question for the jury whether, in receiving it and taking an active part in dealing with it afterwards, she did so with the purpose of aiding her husband in the object he had in view of turning it to profit; or whether what she did was merely for the purpose of concealing her husband's guilt, or screening him from the consequences. In the first case she might be found guilty; in the second she ought to be acquitted. *Reg. v. M'Clarens and others*, 425

INDICTMENT.

An indictment containing counts for stealing as well as receiving, under sect. 3 of 11 & 12 Vict. c. 46, may have as many counts for receiving as for stealing; and the prosecutor is not bound to elect upon which of the counts for receiving he will rely. *Reg. v. Beeton*, 451

An indictment charged a larceny of "two pieces of the current silver coin of the realm called shillings, of the goods and chattels of A. B."

Held, that, though "goods and chattels" was an incorrect description of money, those words might be rejected as surplusage, and that then there was a sufficient allegation that the money belonged to A. B. *Reg. v. Radley*, 460

PRINCIPAL AND ACCESSARY.

If A. unlocks a door of a room of which he has the key, in order to allow B. to commit a larceny in it, and A. then goes away, and B., in his absence, enters the room, and removes articles out of it, A. is not a principal in the larceny. *Reg. v. Jeffries and another*, 85

BY SERVANT.

A servant entrusted with the care of his master's property, and who subsequently appropriates it to his own use, is guilty of larceny at the time he so disposes of it, and not at any previous time he may have intended to steal it, the principle of *animus furandi* not applying to the relation of master and servant. *Reg. v. Roberts and another*, 74

A person employed in a tannery got clandestine access to a warehouse, which was part of the tannery, and in which dressed skins were kept, and took from it certain skins dressed by other workmen. They were afterwards seen and recognized at the porch or place in which he worked, and he was indicted for the larceny of them. The jury found that he had not intended to remove the skins from the tannery and dispose of them elsewhere, but that his intention in taking them was, to deliver them to the foreman and to get paid for them as if they were his own work, and that in this way he intended the skins to be restored to the possession of his master.

Held, that he was not guilty of larceny. *Reg. v. Holloway*, 241

The servant of a tallow-chandler removed fat belonging to his master from the room in which it was kept, to a room where his master was accustomed to buy fat from persons who had it to sell, and placed it on a pair of scales there, with intent to sell it to his master, and appropriate the proceeds to his own use.

Held to be a larceny in the servant. *Reg. v. Hull*, 245

If at the time of the taking of a chattel there is no *animus furandi*, a subsequent fraudulent appropriation of it will not make the entire transaction larceny.

The prisoner being a watchmaker received a watch from the prosecutor to be repaired, not then intending to steal it. But in a few days he went away, taking the watch with him; and when taken into custody he said, "I have disposed of the property and it is impossible to get it back."—

Held, that there was no evidence of a larceny. *Reg. v. Thistle*, 573

A. employed B., a drover by trade, to take pigs to C., and to bring back such sum as C. should give him, on being shown a paper given to B. for that purpose. B. had no authority to do anything but deliver the pigs to C. B. took them to the house of C. at an hour in the morning when the inmates were in bed. C. himself was not at home: and the persons who spoke to B. from the window of the house gave him no instructions. B. then sold the pigs to another person and absconded with the price. He had received 2*l.* from A. for expenses, for which he was to account; and by custom he was entitled to receive a sum per day for the time occupied, and also to drive cattle for any other person at the same time.

Held (dissentiente Lord Denman, C. J.), that these facts did not prove B. to be a mere servant of A.; and that, therefore, he had been improperly convicted upon an indictment which charged a larceny of the pigs. If he was a bailee, he could not be guilty of larceny, unless he intended, at the time of the receipt of it, to appropriate the property to his own use; and there was no evidence of any such intention.

The case of *Barnard v. Macnamee* (1 Moo. C. C. 368), questioned. *Reg. v. Hey*, 582.

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MALICIOUS INJURIES.

DAMAGING A WARP.

A warp not sized, but on its way to the sizers to be sized, to fit it for being used in manufacturing goods, is not a warp, "in any stage, process, or progress of manufacture," or prepared for, or employed in, carding, spinning," &c., within the 7 & 8 Geo. 4, c. 30, s. 3, though the indictment is not bad for not averring it to be so. *Reg. v. Mary Clegg*, 295

MALICIOUSLY SHOOTING, 58

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MANSLAUGHTER.

In an indictment for manslaughter by neglect to give a proper signal to denote the obstruction of a line of railway, whereby a collision took place and a passenger was killed,

1st: It was charged that the prisoner's duty was to attend to the proper working of the signals, according to the rules.

Held, that it was not necessary to set out the rules.

2nd: It appeared that the prisoner had many other duties, besides attending to the signal posts, some of them being incompatible with his duty there.

Held, that it was not necessary to set forth all the other duties and then to negative that the prisoner was employed at the time in the discharge of either of such other duties.

3rd: Held, that an averment that it was prisoner's duty to signal an obstruction, and that there was an obstruction which prisoner neglected to signal, was a sufficient description of the offence, and that it was not necessary to aver that the prisoner's duty was, if there was an obstruction *and he saw it*, to signal it, and that there was an obstruction which he might have seen but neglected to see.

4th: That it is sufficient to aver the duty to be to make "a proper signal," without further describing it.

5th: That a count which charged *both* a neglect to give the right signal, and the giving of the wrong signal, is not bad for duplicity.

6th: That it is sufficient to charge "that the prisoner did neglect and omit to alter the said signal," without stating more particularly what was the specific alteration which he so neglected to make. *Reg. v. Pargeter*, 191

VOL. III.

Wherever death ensues from injuries inflicted by parties engaged in any illegal act, an indictment for manslaughter will lie, even though it appear that the deceased had materially contributed to his death by his own negligence. *Reg. v. Longbottom and another*, 439

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MARRIAGE REGISTER.

FALSE STATEMENTS IN.

On an indictment under the 41st section of the 6 & 7 Will. 4, c. 86, the indictment alleged that a certain clergyman had duly solemnized a marriage between the defendant and another person, and that he was about to register in duplicate, in certain marriage register books, furnished to him for that purpose by the Registrar-General, several particulars required to be known, relating to such marriage, and that the defendant wilfully made to the said clergyman for the purpose of being inserted in the said marriage register books, certain false statements, touching the particulars relating to the said marriage. The evidence showed that the entry had been made before the marriage, by the parish clerk, who put the questions to the defendant, and wrote down the answers in the absence of the clergyman, but that after the marriage ceremony was performed, the clergyman read over the whole entry to the defendant, and asked him if it was correct, to which he answered in the affirmative.

Held, that the evidence was sufficient to support the indictment.

Held, also, not necessary to prove that the marriage register books had been furnished to the clergyman by the Registrar-General. *Reg. v. Brown*, 127

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MERGER.

Misdemeanor not merged in felony, 229

MISDEMEANOR.

Upon an indictment for misdemeanor it is no ground for an acquittal, that the evidence necessary to prove the misdemeanor also

shows that it is part of a felony, and that the felony has been completed. Thus upon an indictment for a conspiracy to commit larceny, and charging that in pursuance of that conspiracy the larceny had been committed, the defendant is not entitled to an acquittal, though the evidence proves that he was guilty of felony, the conspiracy proved making him an accessory before the fact of the crime of larceny. *Reg. v. Button and others*, 229

ATTEMPT TO DEFRAUD.

An indictment which merely charges that the defendant did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully to obtain from A. B. a large sum of money with intent to cheat and defraud him, is bad in arrest of judgment. *Reg. v. Marsh and another*, 570

INDICTMENT FOR DISOBEYING ORDER OF JUSTICES.

If two justices have made an order upon the putative father of a bastard child under 7 & 8 Vict. c. 101, which is invalid upon the face of it, it is competent to the same two justices, or to two other justices, having jurisdiction in the case in other respects, to make upon the mother's application a second order upon the same person, as if there had been no previous application. *Reg. v. Brisby*, 476

VERDICT IN.

"Misdemeanor" is *nomen collectivum*; and therefore where an indictment contained several counts, and the venue was to try "whether the said R. be guilty of the perjury and misdemeanor aforesaid or not guilty;" and the verdict was "guilty of the perjury and misdemeanor aforesaid, in manner and form as by the said indictment is supposed against him:"

Held, that they applied to all the counts, and that a general judgment of imprisonment was good. *Ryalls v. The Queen*, 254

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Of juryman not a mistrial, 220

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MURDER.

INDICTMENT.

In an indictment for murder, the 1st count alleged, that the prisoner, "in and upon a certain infant female child, born of the body of her the said Sarah Waters, of tender age, to wit, of about the age of two days, did make an assault," &c., and went on to state a murder by poisoning.

The 2nd count charged an assault, "in and upon the said infant female child, so born of the body of her the said Sarah Waters," &c., and then set forth the cause of death to have been the exposing the child on a heap of ashes, leaving it there exposed to the inclemency of the weather. But there was no allegation in this count of the child's age, or that it was of tender years, so that the natural consequence of the exposure would be its death.

Held, nevertheless, that the 2nd count was good after verdict.

Held, also, that describing the child in the indictment as "*not named*," was not matter of objection. *Reg. v. Waters*, 300

PRACTICE.

An application was made before trial on the part of the accused, that a surgeon named by them should be permitted to inspect the stomach of the deceased person, which was then in the possession of a police officer. The application was granted, and an order made that the inspection should take place in the presence of the police officer, and of the medical persons who had examined it on the part of the prosecution, the expense to be borne by the prisoners, and the coroner to have notice of the time and place of the examination. Form of order. *Reg. v. Spry and another*, 221

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MUTINY.

MERCHANT SEAMEN'S ACT.

A seaman engaged by the master of a vessel and taken to sea without any such written agreement having been entered into between them as is rendered necessary by the 7 & 8 Vict. c. 112, s. 2, is not a seaman or a mariner within the 11 & 12 Will. 3, c. 7, s. 9, and therefore is not liable under that section for making a revolt, by deserting his vessel in port, and inducing the rest of the crew to do the same.

Semble, a merchant vessel is a ship within the meaning of that section. *Reg. v. Smith and another*, 443

NAME.

Insertion of, in an indictment for murder, 72

NAVAL STORES.

UNLAWFUL POSSESSION OF.

The bare possession of marked naval stores does not render a person liable to be convicted under 9 & 10 Will. 3, c. 41, if he be ignorant that the stores are so marked.

A defendant, charged with the possession of two lots of marked naval stores, produced at his trial two certificates in respect of the different lots, signed respectively by the Commodore Superintendent of the Woolwich Dockyard and the Secretary to the Board of Ordnance: the former having been granted to the person of whom the defendant purchased, the latter to the defendant himself.

Held, that these certificates, though not strictly in accordance with 9 & 10 Will. 3, c. 41, ss. 2, 4, were, nevertheless, an answer to the charge. *Reg. v. Willmet*, 281

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NIGHT POACHING.

An indictment under the 9 Geo. 4, c. 69, charged, that the prisoners "were in the Great Ground on the 11th February, armed with intent, then and there, to take game." The evidence showed that the prisoners were all seen, for the first time, in the Great Ground, employed in taking down two nets; after this was done they picked up some dead hares, which were lying on the ground near the nets, and hanging them on long sticks over their shoulders, walked homewards with them. It also appeared that they had dogs with them in the Great Ground.

Held, that the questions for the jury were—First, whether they were in the Great Ground with the intent to take game at that time, and that such intent might be inferred from the presence of the nets and dogs, though they might have taken the hares elsewhere.

Held also, that the allegation that they were "armed" could not be sustained, unless the jury should be of opinion that they took the sticks for the double purpose of carrying away the game, and of attack or defence in

the event of their being interrupted by keepers while in pursuit of game. *Reg. v. Turner and others*, 304

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PERJURY.

INDICTMENT—SEVERAL COUNTS.

In an indictment for perjury alleged to have been committed in an affidavit sworn, before showing cause, in answer to an application by an attorney for taxation of his bill after the expiration of one "month" from its delivery, it is not necessary to negative any application by the party chargeable before the expiration of the month, inasmuch as the judge would have jurisdiction to issue the summons and commence the inquiry whether any such application had been made or not.

The indictment used the word "month:"

Held, that, as the stat. 6 & 7 Vict. c. 73, was expressly referred to in the indictment, the same construction must be given to that word in the indictment as in the statute; and that therefore it must be held to mean "calendar month."

A count of an indictment for perjury concluding thus, "And so the jurors, &c., did say that the said J. N. R., &c., did commit wilful and corrupt perjury," is not bad, because the whole averment may be rejected as surplusage.

The affidavit denied the retainer:

Held, that the retainer was a material fact to be ascertained, and that therefore perjury might properly be assigned upon the statement denying it.

"Misdemeanor" is *nomen collectivum*; and therefore where the venire was to try "whether the said J. N. R. be guilty of the perjury and misdemeanor aforesaid or not guilty;" and the verdict was "guilty of the perjury and misdemeanor aforesaid, in manner and form as by the said indictment is supposed against him:"

Held, that there was no uncertainty in either; that both the venire and the verdict applied to all the counts; and that a general judgment of imprisonment "upon the premises," was good. *Ryalls v. Reg.*, 36

IN THE COUNTY COURT.

An indictment for perjury before the Judge of the County Court alleged that a plaint being entered against the defendant in a certain County Court at W., duly constituted by order in council under the statute, he appeared and was examined, and gave certain false evidence, &c.

Held, 1st. That the fact of the defendant's appearance might be proved by parol testimony, though it appeared that it was entered in a minute-book.

2nd. That the appearance of the defendant dispensed with the necessity of proving the summons.

3rd. That the proceedings and evidence might be proved without the production of the minute-book, the judge having summary jurisdiction.

4th. That the allegation of the constitution of the court by an order in council might be proved by the judge himself by showing that the judge acted in that capacity, and in examination of the act in question. *Reg. v. Ward*, 279

INDICTMENT FOR.

Where an indictment alleged that R. W. falsely swore that "he was in the bar of the house of J. B., on the 15th day of February last, from between the hours of six o'clock and seven o'clock in the evening of the said last-mentioned day, until nine o'clock in the evening of the said last-mentioned day, and that he the said R. W. did not then and there play at any game of cards at all:"

Held, that perjury was not sufficiently assigned by an averment that "the said R. W. did then and there (to wit) in the said bar of the said house and premises of the said J. B. on the said 15th day of February last and between the hours of six o'clock in the evening of the said last-mentioned day, and eight o'clock in the evening of the said last-mentioned day, play at a certain game of cards," &c. *Reg. v. Whitehouse*, 86

An indictment for perjury charged that the perjury was committed in an affidavit of debt filed in the Court of Bankruptcy, for the purpose of causing A. B. to be adjudged bankrupt, and sworn in the Court of Bankruptcy before a registrar thereof.

Held—1, that the 8th sect. of 1 & 2 Vict. c. 110, under which the affidavit was sworn, is not repealed by the 11th sect. of 5 & 6

Vict. c. 122; and that therefore the false statements therein were material to a judicial inquiry.

2. That the affidavit was made in a matter relating to bankrupts; and therefore properly sworn before the registrar by virtue of sect. 67 of 5 & 6 Vict. c. 122

The affidavit, as set out in the indictment, stated that A. B. C. was indebted; but "A. B. C." was explained by an innuendo to mean "the said A. G. B. C." mentioned in the inducement; and the negative allegation was "Whereas in truth and in fact the said A. G. B. C. was not indebted."

Held, that the falsehood of the statement was sufficiently averred. *Dunn v. The Queen*, 205

An indictment for perjury committed in an affidavit sworn in answer to an application by an attorney for taxation of his bill of costs, averred that the application of the attorney was made after the expiration of "one month" from the delivery of the bill of costs—the dates of the application and of the delivery of the bill were laid under a videlicet; but if taken to be correct, they showed that more than a calendar month had elapsed between the delivery of the bill and the application.

Held, that (assuming month to mean lunar month, and that the judge would have no jurisdiction unless a calendar month had elapsed) in order to support the indictment the videlicet must be rejected, and the dates assumed to be correct.

But, *semble*, that the jurisdiction of the judge to issue the summons sufficiently appeared, without showing that a calendar month had elapsed. *Ryalls v. The Queen*, 254

TO OBTAIN A MARRIAGE LICENCE.

It is a misdemeanor at common law to make a false statement upon oath before a surrogate in order to obtain a marriage licence.

Quære, whether it is perjury.

An indictment charged that A. B. went before a surrogate, and with intent to deceive the surrogate, and obtain from him a marriage licence, swore (the said surrogate having authority to administer the said oath to the said A. B.), that his name was C. D., that he was a widower, and one of the parties for whom the licence was obtained, and that the woman had had her usual place of abode for the space of fifteen days within the parish in which the marriage was to be celebrated, whereas his name was not C. D., &c. (negating all the statements); and that by the said false oath the said A. B. fraudulently obtained the marriage licence.

Held, that this was a good count for misdemeanor, without averring a marriage had,

or intention to procure a marriage; that the allegation of authority in the surrogate to administer the oath did not mean authority to administer an oath upon which, if false, perjury could be assigned, but was supported by the general authority of the surrogate to administer the oath in such cases; and that the indictment was supported by proof that any one of the statements made on oath was false. *Reg. v. Chapman*, 467

PAWNBROKERS' ACT.

To prove the making of a false declaration under the Pawnbrokers' Act (39 & 40 Geo. 3, c. 99), it is not absolutely necessary to call the magistrate before whom it was made, or some one present at the time. It is sufficient to show such facts as necessarily lead to the conclusion that the defendant made it, and had a knowledge of the contents. *Sed quere*.

To prove that such a declaration is false in fact, it is necessary to negative the defendant's statement by the oath of two witnesses, in the same manner and to the same extent as the proof of an assignment for perjury. *Reg. v. Browning*, 437

On an indictment for perjury alleged to have been committed in an answer to a certain interrogatory exhibited in a suit in the Ecclesiastical Court, it appeared that a suit for divorce, on the ground of adultery, had been instituted against the prosecutor by his wife; that the defendant was a witness examined on behalf of the wife to prove her case; that cross-interrogatories were exhibited to him by the prosecutor by way of cross-examination, one of which, put for the purpose of impeaching his character, was the following: "Have you not passed by the name of Abbott, and also of Johnson?" His answer was, "I have never passed by the assumed name of Abbott or Johnson." It was clearly proved that he had.

Held, that the question and answer were not sufficiently material to the issue to warrant the case going to the jury. *Reg. v. Worley*, 535

Upon an indictment for perjury containing two counts, the entry of the final judgment was "It is considered, &c., by the court here, that he the said K., for the offence charged upon him, in and by each and every count of the indictment, be imprisoned," &c.

Held sufficient.

An affidavit to hold to bail may be sworn before the issuing of the writ in the action; and, therefore, an indictment for perjury committed in such an affidavit need not state that any action was pending. *King v. The Queen*, 561

PLEADING.

Quere, whether a prisoner indicted for a felony not capital is not entitled to demur and plead over at the same time.

Semble, that *Reg. v. Purchase* (Car. & Marsh. 619), and *Reg. v. Phelps* (ib. 180), are in that respect overruled by *Reg. v. Odgers* (2 Moo. & Rob. 480), and can no longer be considered law; and that the judgment upon a demurrer in a criminal case, not capital, is final judgment, and not a respondeat ouster. *The Queen v. John Mitchell*, 1

Where a defendant had pleaded inadvertently to an indictment under circumstances which might show it to have been a mistake on his part, the court refused to allow him to withdraw his plea for the purpose of demurring, where the objection was one of a technical character, not in any way affecting the merits of the case. *Reg. v. Brown*, 127

DEMURRER.

A count in an indictment, under the stat. 60 Geo. 3, c. 1, the first section of which prohibits assemblies of persons for the purpose of unlawfully "practising military exercise," and then goes on to impose a penalty on all persons who shall "train or drill" any other person, or who shall be trained or drilled, is not bad for duplicity, though it charges the offence which is prohibited, and the offence for which a penalty is imposed.

The omission of a prisoner's "addition" is not demurrable.

When the time for which an offence can be prosecuted is limited by statute, the omission to state the time of the commencement of the offence is not demurrable. *Reg. v. Hunt*, 215

An indictment found by a grand jury of Dorsetshire contained two counts, one (the 5th) charging A. with sheep stealing in Dorsetshire; and another charging B. with feloniously receiving in Somersetshire, a sheep before then feloniously stolen, &c., "being the same property as mentioned in the 5th count."

Held, that the 2nd count was bad, for not showing jurisdiction to try in Dorsetshire; the words of reference to the 5th count not being sufficient for that purpose. *Reg. v. Martin*, 447

Indictment for perjury, 86

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POACHING.

Under the 9th section of 9 Geo. 4, c. 69, if several persons are indicted for entering enclosed land by night armed for the purpose of taking game, it is not necessary to prove that all entered the enclosed land; it is enough if some are proved to have entered the land, and the rest are shown to have been engaged with them in a common object, and to have been near enough to render assistance. *Reg. v. Whitaker and others*, 50

To justify the apprehension of an offender, under 1 & 2 Will. 4, c. 32, s. 31, it is only necessary that he should have been made to understand, by the person authorized under that section, that he is required to tell his Christian name, surname, and place of abode, and that he should have refused to comply with such requisition. It is not necessary that he should have been required both to quit the land and also to tell his name.

Damage done to a fence by a poacher's dog in pursuit of game, is not a "malicious" injury within the meaning of stat. 7 & 8 Geo. 4, c. 30, s. 23. *Reg. v. Prestney*, 505

Indictment for night poaching, evidence to sustain, 304

POST-OFFICE.

EVIDENCE—VERDICT.

On an indictment under the 7 Will. 4 & 1 Vict. c. 36, s. 26, against a clerk in the Post-office, containing a count for stealing and another for secreting post-letters, the jury found that the prisoner, having committed a mistake in the sorting of the letters in question, secreted them in the water-closet, in order to avoid a certain penalty with which such a mistake was usually visited by the authorities of the Post-office.

Held, that such finding amounted to a verdict of guilty on both counts. *Reg. v. Wynn*, 271

New statute as to (11 & 12 Vict. c. 88), App. lii

PRACTICE.

A prisoner indicted for felony is not entitled to a copy of the indictment found against him, or to a copy of the jury panel, or to copies of the panels returned at former sessions of the court.

On the 13th May the prisoner was committed for trial at a session to commence on the 20th May, on which day a bill was sent up to the grand jury against him, which was on the 22nd found a true bill; and until the 23rd of May (when his trial was fixed for the 25th inst.), no attempt was made to secure the attendance at the trial of one S. M., who it then appeared had left Dublin on the 22nd. The court refused to postpone the trial, notwithstanding an affidavit, by the prisoner's attorney, that he believed sufficient grounds existed for challenging the array on the part of the prisoner, and that the said S. M. was "a most indispensable witness to sustain said challenge."

To induce a court to postpone a criminal trial on account of the absence of a witness, it must be shown, by affidavit, that the witness is material—that due diligence has been used to secure his attendance—and that it can be obtained by the postponement. *The Queen v. J. Mitchell*, 1, 2

PRINCIPAL AND ACCESSARY.

Where a principal and accessary are indicted together, they will not be allowed to sever in their challenges so as to be tried separately. *Reg. v. Ann Fisher*, 68

Semble, a barrister who acts as an interpreter must be sworn. *Reg. v. Kelly and another*, 75

COUNSEL—DEFENCE.

Where one prisoner was indicted for stealing and the other for receiving, and the receiver was defended by counsel, but the principal felon was undefended, the court called upon the principal to make his statement to the jury before the counsel for the receiver was permitted to address them. *Reg. v. Martin and Butt*, 56

OF CRIMINAL APPEAL COURT.

A question of law raised by motion in arrest of judgment after the conviction of the prisoner may be reserved under 11 & 12 Vict. c. 78.

This court will hear counsel in support of the conviction, though no counsel are instructed on the part of the prisoner. *Reg. v. Martin*, 447

GRAND JURY.

Quære, Is the number of jurors sworn on the Grand Jury necessarily limited to twenty-three? *Re Staffordshire Grand Jury*, 433

JUDGMENT.

The judge, before whom an indictment for perjury was tried, passed sentence at *nisi prius*, and ordered the defendant to be imprisoned for eighteen months, and to give security to keep the peace and be of good behaviour for two years, to commence from the expiration of the eighteen months, and to be further imprisoned until such security should be given.

Held, that the judge had authority to pass that sentence.

Within six days after the commencement of the term following the trial, the Court of Queen's Bench granted a rule in arrest of judgment, which was afterwards discharged; but this rule did not appear upon the transcript of the record transmitted to this Court; and this Court therefore refused to take any notice of it, or to grant a rule that it should be annexed to or endorsed upon the record. *Dunn v. The Queen*, 205

The judgment entered upon the record was, that the said J. M. "be transported beyond the seas for the term of ten years, from the 8th day of August instant," without specifying some place of transportation, "not in Europe."

Held, that the judgment was correct and valid, notwithstanding. *John Martin v. The Queen*, 318

JURY.

The propriety of discharging the jury in a criminal case, upon the ground of their being unable to agree, is a matter within the discretion of the judge.

The trial of an indictment for murder was concluded in the middle of Thursday. The jury retired to consider their verdict, and, being unable to agree, were locked up during the night. On Friday morning they came into court, and stated that they were equally divided, and that it was impossible that they should agree. All the other business of the assizes was over; and the duty of the judge required him to go to the next town on the circuit.

Held, that under these circumstances, he was justified in discharging the jury.

Semble, if the discharge of the jury was wrong, it would not have entitled the prisoner to be discharged upon *habeas corpus*. *Reg. v. Newton*, 489

MISDEMEANOR.

In entering an award of a new trial upon the record of the proceedings upon an indictment for misdemeanor, it is unnecessary to state the reasons for which the new trial was granted; it is enough to say "because it appears to the court that the said verdict was unduly given, therefore the said verdict is by the said court here vacated and made void, and all other process ceasing against the jury before impanelled, the sheriff, &c., is commanded that he cause a jury anew thereupon to come," &c. *King v. The Queen*, 561

A Court of Quarter Sessions may be legally held by the justices of a county or the recorder of a borough during the sitting of the judges of assize, under the ordinary Commissions of Oyer and Terminer and General Gaol Delivery in the same country; for the Assize Court is not a Court of Error from the Quarter Sessions, nor are the Commissions of Oyer and Terminer and Gaol Delivery similar in their nature to the commission of the peace: but it would be highly inconvenient and improper for magistrates to adopt the practice of holding their sessions concurrently with the assizes, even in a different part of the county. *John Smith v. The Queen*, 586

MISDEMEANOR—QUARTER SESSIONS.

Upon a bill for a misdemeanor, found at the Quarter Sessions, the defendant traversed.

Held, that the traverse was to the next Quarter Sessions, and not to the assizes which preceded them; and that, although the defendant was in prison, the judge would not permit him to be discharged on his own recognizances.

The Commission of Gaol Delivery extends only to prisoners in the gaol, and not to the prisoners in the house of correction.

The judge of assize will discharge, upon his own recognizance, a prisoner committed to the gaol for trial at the Quarter Sessions (where such sessions are to be held after the assizes), if an indictment be not preferred against him at such assizes. *Reg. v. Arlett*, 431

NOTICE OF TRIAL IN MISDEMEANOR.

Where a defendant is under recognizances to appear and take his trial at a particular session of the Central Criminal Court, no notice of trial to the prosecutor is requisite, and he is bound to be prepared to try at that session. *Reg. v. Parker*, 299

PLEADING.

Semble, that upon an indictment for a felony, which felony includes an assault, it is not

competent to the prisoner to plead guilty to an assault and not guilty to the felony.

The two prisoners were indicted for a robbery, with violence, and having pleaded not guilty to the entire charge, afterwards, with the consent of the prosecutor's counsel, who stated that he was willing to offer no evidence of the felony, wished to withdraw their plea and plead guilty to a common assault.

Held, that the proper course, under such circumstances, would be for the prisoners to plead not guilty generally, and for the prosecutor to offer evidence only of the assault, and for the jury to return a verdict accordingly of guilty of a common assault only. *Reg. v. Mark Cleaves and another*, 429.

PROOF OF PRISONER'S STATEMENT.

Semble, that for the purpose of proving a prisoner's statement on his examination before a magistrate, it is not sufficient that the form given in schedule (N.) to the 11 & 12 Vict. c. 42, has been read over to the prisoner; but that there must be some proof that the caution mentioned in the proviso contained in the latter part of the 18th section has been also given. *Reg. v. Humber*, 223

The recent statute 11 & 12 Vict. c. 78, s. 5, does not apply to cases which occurred before it came into operation, so as to authorize the court, upon the reversal of an erroneous judgment pronounced upon an indictment before the statute passed, to send back the record that the proper judgment may be passed. *Drury and others v. The Queen*, 252

PROSECUTION.

A judge ought not to have imposed upon him the appearance of acting as prosecutor.

All the witnesses who have been examined before the grand jury ought to be called by the prosecutor.

Counsel ought to be employed to prosecute.

In cases of felony, the prosecutor will be allowed the expenses of the prosecution, where it has been properly conducted. *Reg. v. Farrell and another*, 139

RECORDER.

Per Patteson, J.—The Recorder of a borough has the same jurisdiction to reserve a case under 11 & 12 Vict. c. 78, as any other court of quarter sessions. *Reg. v. Masters*, 178

SPECIAL VERDICT.

A. was indicted for stealing a watch; for the defence it was suggested that he had found it, and retained possession of it for the pur-

pose of restoring it to the owner; the jury returned the following verdict in writing:—“We find the prisoner not guilty of stealing the watch, but guilty of keeping it in hope of a reward from the time he first had the watch;” the court directed a verdict of “guilty” to be entered.

Held, that the finding amounted to a verdict of “not guilty,” and that a verdict of “not guilty” ought to have been entered. *Reg. v. York*, 181

TRIAL.

By consent, a jury may be charged with the trial of two or more indictments at the same time, even though the indictments be for different offences, and against different persons, where the circumstances upon which the indictments are founded form part of the same transaction. *Reg. v. White and others*, 79

WITNESSES FOR PROSECUTION.

It is in general a matter entirely within the discretion of counsel for the prosecution whether all the witnesses at the back of the bill should be called on behalf of the crown or not; and, although the judge has the power to interfere, he will only exercise it in extreme cases. *Reg. v. Edwards and others*, 52

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RAPE.

EVIDENCE.

Semble, that on a charge of rape the jury may find the prisoner guilty of assault where, disbelieving that the prosecutrix offered resistance to the connexion itself, they have independent evidence before them that she resisted his efforts to lay hands on her in the first instance. But,

Held, that they cannot be asked to find such a verdict where they have no other evidence of the transaction except her statement. *Reg. v. Clarke*, 481

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Though a child under ten years of age cannot legally consent to a rape upon her, yet she may consent to the attempt to commit it; and such an attempt, with her consent, would not be an assault. Where, therefore, a child is too young to know the nature of an oath, her evidence as to a rape upon her cannot be taken, and marks of violence on her private parts cannot be presumed to have been done against her consent. *Reg. v. Cockburn*, 543

RECEIVING.

EVIDENCE OF.

Upon an indictment for receiving stolen goods, it was proved that the stolen goods were forwarded by coach to a particular coach-office, without any direction upon them, but with instructions that a person would call for them; and that the prisoner did call and inquire for them. They were shown to her, and she claimed them as the goods for which she came. She was then immediately taken into custody.

Held, that the evidence was insufficient to warrant a conviction; as, although she claimed the goods, they never were delivered into her possession. *Reg. v. Hill*, 533

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RIOT.

If persons are assembled together to the number of three or more, and speeches are made to those persons to excite and inflame them, with a view to incite them to acts of violence, and if that same meeting is so connected, in point of circumstances, with a subsequent riot that you cannot reasonably sever the latter from the incitement that was used, those who incited are guilty of the riot, although they are not present when it occurs. *Reg. v. Sharpe*, 288

ROBBERY.

ASSAULT—VERDICT.

Upon an indictment of three prisoners for robbery, with violence, it was proved that

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A. knocked the prosecutor down and B. and C. took his property from his pockets.

Held, that if A. took no part in the robbery, he could not be convicted of an assault, inasmuch as the assault was unconnected with the robbery, and therefore an independent offence.

Held, also, that it was competent to the jury to find all the prisoners guilty of an assault, if they were of opinion that the prosecutor had not been robbed by either of them, but only assaulted by all of them. *Reg. v. Barnett and others*, 432

SACRILEGE.

Burglary may be committed in a church at common law.

To warrant a conviction for breaking and entering a church under 7 & 8 Geo. 4, c. 29, s. 10, there must be a stealing therein of some chattel. Stealing a fixture will not be sufficient.

But if the stealing of fixtures is averred in such count, the prisoner may be convicted simply thereof under the 44th section of that statute. *Reg. v. Baker*, 581

SEAMEN'S TICKETS.

Form of indictment for attempting to traffic in, under 7 & 8 Vict. c. 112; App. xxxi

SEDITION.

LIBEL—INDICTMENT.

To an ex-officio information filed by the Attorney-General against J. M., for the publication of a seditious and defamatory libel, the defendant pleaded that an indictment had been found against him in the Queen's Bench for the publication of a seditious and defamatory libel, upon which he was duly arraigned, and such proceedings were thereupon had; that afterwards the Attorney-General came into court and said that he would not further prosecute the said J. M., and that the said J. M. should go thereof without day, and that the said J. M. and the said J. M. so indicted and arraigned, were one and the same person, and not other and different persons; and that the offences of which he the said J. M. was so indicted and arraigned as aforesaid, and the offences in the said information specified were one and the same; and, that according to the laws and customs of this realm, the said J. M. ought to be free and exempt, under the circumstances aforesaid, from being compelled to answer for the said supposed offences, in

the information specified, before any judge or minister of our Lady the Queen, or any other judge in any court whatsoever, except upon indictment found, or presentment made, on the oaths of twelve men of the body of the county in which the said supposed offences were committed; concluding with a verification, and praying judgment if the court would or ought to take cognizance of the information aforesaid, and that he might be dismissed and discharged and so forth.

To this plea the Attorney-General demurred, and prayed "judgment, and that the said J. M. might be convicted of the premises above charged upon him in and by the said information."

To another information for a similar offence, the defendant pleaded that, therefore, &c., an indictment was found in the Queen's Bench against one J. M., for the publication of a seditious libel, and that he and the said J. M. so indicted were one and the same person, and not other and different persons, and that the said several supposed offences in the several counts of the indictment, and the several offences in the several counts in the said information were one and the same, and that he was duly arraigned on the said indictment, and that it was still depending against him in the court of our Lady the Queen; concluding with a verification and praying "judgment of the said information, and that he may not be compelled to answer thereto."

Replication to this plea; that after the arraignment of the said J. M., upon the indictment in the plea mentioned, and before the exhibiting of the said information, the said J. M. pleaded in abatement of the indictment, that one of the jurors by whom the bill was found was disqualified; and that the said Attorney-General, after the pleading the said plea, and before the exhibiting of the said information, came into court, and said that he would not further prosecute the said J. M. on the said indictment, and thereupon it was considered and adjudged by the court against him the said J. M., upon the said indictment, as by the record and proceedings thereof remaining in the said court more fully appears; concluding with a verification, and praying "judgment and that the said J. M. may be convicted of the premises in the said information specified."

To this replication the defendant demurred, praying "judgment of the said replication, and that he the said J. M. may not be compelled to answer the same."

Held, that both the pleas were bad: that an Attorney-General is at liberty, after

having entered a *nolle prosequi* on an indictment, to file an ex-officio information for the same offence; and that in prosecutions for crimes the pendency of an indictment or information is not a good plea to an information subsequently filed against the same party for the same offence.

Semble, that the observations in 2 Hawkins P. C. lib. 2, ch. 34, s. 1, in favour of the validity of such pleas to informations, apply only to informations *qui tam*.

Semble, also, that the entry of a *nolle prosequi* puts an end to an indictment.

Although the prosecutor having demurred to a plea in abatement, concluded in bar praying final judgment:

Held, that the court were not precluded thereby, but were bound to give that judgment which was right on the whole record.

Where a replication to a plea in abatement introduces new matter, upon which issue may be taken, the prosecutor is entitled to pray final judgment.

Quere, Whether there can be, on the part of the crown, a discontinuance in pleading? *Reg. v. Mitchell*, 43

INDICTMENT.

An indictment for sedition alleged "that the defendant, amongst other words and matter, uttered the words and matter following," and then set out several sentences as though they had been uttered continuously. The evidence showed that they had not been so uttered, but that the sentences had been selected from different parts of the speech, other matter intervening between them.

Held, that there was no variance, and that if any portion of the speech omitted varied or controlled the sense of those parts that were set out, the onus was upon the defendant to show it. *Re Crowe*, 123

Where an indictment contained counts for sedition, attending a seditious meeting and a riot, the court refused to quash the indictment, or compel the counsel for the prosecution to elect, although the judgment on the last count might be different from that upon the others.

The words set out in an indictment for sedition were these, "If the Queen neglects to recognize the people, then the people must neglect to recognize the Queen." It was proved that the word "forget" was used in both instances, and not "neglect."

Held, to be a fatal variance as far as that sentence was concerned, and that the passage must be struck out.

The indictment contained these words, "If John Mitchel is sent out of his country

every Irishman must rise and avenge the insult or you will be no longer worthy of the name." Instead of the word "you," the word "they" was proved to have been used.

Held, that the words "or you will be no longer worthy of the name" must be struck out; but, as the former part of the sentence was complete in itself, uncontrolled by that which came after, and contained what substantially amounted to sedition, it might stand.

The indictment charged the following words:—"The Government is not worthy the support of any honest man; it is too contemptible to be recognized, and you must use your best endeavours to overthrow it. And now, I wish to impress upon you, there is one safe way of getting rid of rulers." It proved that the word "bad" had been used immediately preceding the last word "rulers."

Held, that the variance was immaterial. *Reg. v. Fussell*, 291

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25 Edw. 3, stat. 5, c. 2, p. 360

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5 & 6 Will. & M., c. 11, s. 3, p. 426

9 & 10 Will. 3, c. 41, s. 2, p. 281

11 & 12 Will. 3, c. 7, s. 9, p. 443

25 Geo. 2, c. 36, p. 578

27 Geo. 3, c. 15, s. 8, p. 137

33 Geo. 3, c. 52, s. 62, p. 163

39 & 40 Geo. 3, c. 99, s. 16, p. 437

49 Geo. 3, c. 126, p. 499

60 Geo. 3, c. 1, p. 306

7 Geo. 4, c. 64, s. 20, p. 42

7 & 8 Geo. 4, c. 29, s. 49, p. 64

7 & 8 Geo. 4, c. 29, s. 53, p. 284

7 & 8 Geo. 4, c. 29, s. 58, p. 462

7 & 8 Geo. 4, c. 29, s. 10, p. 581

7 & 8 Geo. 4, c. 29, s. 58, p. 462

A. knocked the prosecutor down and B. and C. took his property from his pockets.

Held, that if A. took no part in the robbery, he could not be convicted of an assault, inasmuch as the assault was unconnected with the robbery, and therefore an independent offence.

Held, also, that it was competent to the jury to find all the prisoners guilty of an assault, if they were of opinion that the prosecutor had not been robbed by either of them, but only assaulted by all of them. *Reg. v. Barnett and others*, 432

SACRILEGE.

Burglary may be committed in a church at common law.

To warrant a conviction for breaking and entering a church under 7 & 8 Geo. 4, c. 29, s. 10, there must be a stealing therein of some chattel. Stealing a fixture will not be sufficient.

But if the stealing of fixtures is averred in such count, the prisoner may be convicted simply thereof under the 44th section of that statute. *Reg. v. Baker*, 581

SEAMEN'S TICKETS.

Form of indictment for attempting to traffic in, under 7 & 8 Vict. c. 112; App. xxxi

SEDITION.

LIBEL—INDICTMENT.

To an ex-officio information filed by the Attorney-General against J. M., for the publication of a seditious and defamatory libel, the defendant pleaded that an indictment had been found against him in the Queen's Bench for the publication of a seditious and defamatory libel, upon which he was duly arraigned, and such proceedings were thereupon had; that afterwards the Attorney-General came into court and said that he would not further prosecute the said J. M., and that the said J. M. should go thereof without day, and that the said J. M. and the said J. M. so indicted and arraigned, were one and the same person, and not other and different persons; and that the offences of which he the said J. M. was so indicted and arraigned as aforesaid, and the offences in the said information specified were one and the same; and, that according to the laws and customs of this realm, the said J. M. ought to be free and exempt, under the circumstances aforesaid, from being compelled to answer for the said supposed offences, in

the information specified, before any judge or minister of our Lady the Queen, or any other judge in any court whatsoever, except upon indictment found, or presentment made, on the oaths of twelve men of the body of the county in which the said supposed offences were committed; concluding with a verification, and praying judgment if the court would or ought to take cognizance of the information aforesaid, and that he might be dismissed and discharged and so forth.

To this plea the Attorney-General demurred, and prayed "judgment, and that the said J. M. might be convicted of the premises above charged upon him in and by the said information."

To another information for a similar offence, the defendant pleaded that, therefore, &c., an indictment was found in the Queen's Bench against one J. M., for the publication of a seditious libel, and that he and the said J. M. so indicted were one and the same person, and not other and different persons, and that the said several supposed offences in the several counts of the indictment, and the several offences in the several counts in the said information were one and the same, and that he was duly arraigned on the said indictment, and that it was still depending against him in the court of our Lady the Queen; concluding with a verification and praying "judgment of the said information, and that he may not be compelled to answer thereto."

Replication to this plea; that after the arraignment of the said J. M., upon the indictment in the plea mentioned, and before the exhibiting of the said information, the said J. M. pleaded in abatement of the indictment, that one of the jurors by whom the bill was found was disqualified; and that the said Attorney-General, after the pleading the said plea, and before the exhibiting of the said information, came into court, and said that he would not further prosecute the said J. M. on the said indictment, and thereupon it was considered and adjudged by the court against him the said J. M., upon the said indictment, as by the record and proceedings thereof remaining in the said court more fully appears; concluding with a verification, and praying "judgment and that the said J. M. may be convicted of the premises in the said information specified."

To this replication the defendant demurred, praying "judgment of the said replication, and that he the said J. M. may not be compelled to answer the same."

Held, that both the pleas were bad: that an Attorney-General is at liberty, after

7 & 8 Geo. 4, c. 30, s. 49, p. 64
 7 & 8 Geo. 4, c. 30, s. 3, p. 295
 7 & 8 Geo. 4, c. 30, p. 565
 9 Geo. 4, c. 69, p. 50
 9 Geo. 4, c. 69, s. 9, p. 304
 1 & 2 Will. 4, c. 32, p. 505
 5 & 6 Will. 4, c. 50, ss. 94, 95, p. 59
 5 & 6 Will. 4, c. 62, s. 12, p. 437
 6 & 7 Will. 4, c. 86, s. 41, p. 127
 7 Will. 4 & 1 Vict. c. 36, s. 26, p. 271
 7 Will. 4 & 1 Vict. c. 85, s. 4, p. 442
 1 Vict. c. 85, s. 10, p. 137
 1 Vict. c. 85, s. 2, p. 141
 1 & 2 Vict. c. 110, s. 8, p. 205
 5 & 6 Vict. c. 122, ss. 11, 13, 67, p. 205
 6 & 7 Vict. c. 73, p. 427
 11 & 12 Vict. c. 11, p. 158
 11 & 12 Vict. c. 12, p. 517
 11 & 12 Vict. c. 42, s. 18, p. 223
 11 & 12 Vict. c. 46, s. 3, p. 451
 11 & 12 Vict. c. 78, p. 178
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It is not necessary, in order to sustain an indictment for compassing to levy war against the Queen, in order by force and constraint to compel her to change her measures and counsels, either to aver in the indictment or prove at the trial, a compassing or intention to compel Her Majesty to change any particular measures or counsels.

Held, that upon an indictment, charging the publication by the prisoner of a printing purporting to be a report of a speech made by a Mr. Mitchel at Limerick, as an overt act of compassing to depose our Lady the Queen, and to levy war to compel her, by force and constraint, to change her measures and counsels, evidence that the prisoner spoke at the place mentioned a speech to the same purport, was only admissible to show that the prisoner was the Mr. Mitchel meant in the printed report of the speech in question. *The Queen v. Mitchel*, 2

See HIGH TREASON.

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UNNATURAL CRIME.

EVIDENCE OF.

On an indictment for sodomy, it was proved that the prisoner induced a boy of twelve years of age to have carnal knowledge of his person, the prisoner having been the pathic in the crime.

Held, that the evidence was sufficient to support the indictment. *Reg. v. Allen*, 271

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WITNESS.

A prisoner convicted of an offence, who was jointly indicted with another afterwards put upon his trial, is an admissible witness for the prisoner on trial, although individually named on the record. *Reg. v. Archer*, 228

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WOUNDING BY FIRE-ARMS.

An indictment, in the first count, charged that T. S., with a leaden ball and shot, out of a gun, by force of gunpowder, shot and sent forth, S. D. feloniously did strike, penetrate, and wound, with intent, in so doing, the said S. D. feloniously to kill and murder: and that W. D. was present, aiding and abetting. Another count charged W. D. as principal, and T. S. as present, aiding and abetting; and in other counts they were charged as principals and accessaries respectively in the like wounding of S. D. with intent to disable him, and to do him grievous bodily harm. The record stated that the prisoners were found guilty upon the first count, and sentenced to death; and that the jury were discharged from giving any verdict upon the other counts.

Held, that the first count sufficiently charged a wounding within the meaning of the stat. 1 Vict. c. 85, s. 2, and warranted the judgment pronounced upon it, notwithstanding the non-averment of the infliction of bodily injury dangerous to life.

Held, also, that the discharge of the jury from giving any verdict upon the issues joined on the other counts did not render the judgment upon the first count erroneous. *Shea v. The Queen*, 141

WOUNDING MALICIOUSLY.

EVIDENCE—PRACTICE.

Evidence of a violent kick in the private parts of a woman, which caused a flow of blood mingled with urine for some time afterwards, is not a wounding within the statute, no proof being given as to the precise part whence the blood originally came.

On such an indictment a prisoner cannot plead guilty to a common assault. *Reg. v. Jones*, 441

A rupture of the lining membrane of the urethra, followed by a small flow of blood, such rupture being caused by a kick in the private parts of the prosecutor, is a wounding within the 7 Will. 4 & 1 Vict. c. 85, s. 4. *Reg. v. Waltham*, 442

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Page 36, for " Court of Exchequer," read " Court of Queen's Bench."



